

# “Parallel Contract”

Aditi Bagchi  
University of Pennsylvania, Law School

Legal Theory Workshop  
UCLA School of Law

**11/10/2011, 5:00p.m.-6:45p.m., Room 1314**

**\* [Please Note Date Change]**

<http://www.law.ucla.edu/home/index.asp?page=817>

*Draft, October 2011. For UCLA Workshop.  
Please Don't Cite Or Quote Without  
Permission.*



Dear participants of the UCLA Legal Theory Workshop:

Below is an early draft of a paper with two separable parts. Parts I and II are more doctrinal, or at least, aspire to have concrete doctrinal implications with respect to the interpretation of contracts in certain contexts. Part III proposes a way to carve up theories of contract more generally. One can read Parts I and II without Part III and vice versa.

Please forgive the incomplete citations, among other problems. I very much look forward to your feedback, which will come at a stage when it will be genuinely useful to me. Thanks in advance.

Aditi Bagchi



## Parallel Contract [DRAFT]

Aditi Bagchi

All contracts are incomplete<sup>1</sup> and most contracts are not fully negotiated; few terms are negotiated at all. Parties to contract are often dimly aware of the content of their rights and obligations under an agreement at the moment of its formation.<sup>2</sup> They come to understand that content through communications received after contract, and with individuals who are not party to the agreement.

These well-known facts about the typical contractual process are nevertheless alarming because they remain at odds with the classical picture of contract which continues to motivate our reasoning about the sources of contractual obligation and the best methods of contractual interpretation.

In the classical account, individuals negotiate agreements that impose discrete performance obligations on each party, in an exchange which each understands to be in its respective best interest.<sup>3</sup> Consent creates contractual obligations where there were none before, and only after the process of negotiation and evaluation is complete. No obligations precede the moment of mutual consent and the obligations fixed by contracts are not subject

---

<sup>1</sup> See Randy Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 821 (1992) (“By now everyone acknowledges the legal realist insight that all contracts are, by necessity, incomplete to some degree.”); Randy Barnett, *Conflicting Visions: A Critique of Ian Macneil’s Relational Theory of Contract*, 78 Virginia Law Review 1175, 1203 (1992) (acknowledging that “[t]here is no magic moment of contractual conception at which time every right and obligation of contracting parties is unambiguously expressed”).

<sup>2</sup> See Stewart Macaulay, *Non-contractual relations in business: A Preliminary Study*, 28 Am. Soc. Rev. 55, 60 (1963) (“[m]any, if not most, exchanges reflect no planning, or only a minimal amount of it, especially concerning legal sanctions and the effect of defective performances. As a result, the opportunity for good faith disputes during the life of the exchange relationship often is present.”).

<sup>3</sup> See P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L. Q. Rev. 193, 194-95 (1978) (describing, and critiquing as antiquated, the “paradigm of modern contract” as a “bilateral executory agreement” consisting of “an exchange of promises” that is “deliberately carried through, by the process of offer and acceptance, with the intention of creating a binding deal. When the offer is accepted, the agreement is consummated, and a contract comes into existence before anything is actually done by the parties.”).

to modification unless and until there is a comparable moment of self-conscious consent to modification.

The concepts of contracts of adhesion and relational contract have each attempted to correct the classical picture. Contracts of adhesion are take-it-or-leave-it contracts which one side has no opportunity to negotiate. Usually, that party is also unfamiliar with many contracts terms before formally consenting to them and may believe she holds rights against the other party which she in fact waives under the contract. Often, that party has no practical alternative to certain terms or contracts. The standard form contract between a company and a single consumer is the product of a market consisting of many consumers, and consumers navigate that market with information obtained primarily from other consumers.

Relational contracts are different. The parties to a relational contract often have a relationship prior to contract; at the least, their relationship extends beyond the terms of contract. The relationship is of mutual dependence and this dependence motivates each party's behavior within the contractual arrangement. Contract terms are vague and open-ended; the conduct of the parties is a function of a dense network of background norms and it is unclear which of those norms are intended to be legally binding. Neither the controlling norms nor the boundaries of contract are spelled out at the time of contract or at any fixed point in the relationship.

Contracts of adhesion and relational contracts are in some ways opposite to each other, since the former envisions total anonymity and impersonality while the latter suggests thick, detailed and tailored norms. Both have been important to showing a lack of fit between standard contract doctrine and certain kinds of contract, including the typical consumer contract, contracts between intimates, contracts embedded in certain closed business communities and possibly employment contracts.

But those who wish to challenge the presumptions of (still) classical contract law have relied too much on the ideas of contracts of adhesion and relational contract. These two models do not cover the full expanse of the contractual landscape, even together with those contracts to which the classical model does apply. Relational contract theory is also guilty of sometimes claiming a universality that undermines the corrective quality of its critique of classical contract theory. In this Article I identify another model of contract, parallel contract. In settings characterized by parallel contract, one party enters into a series of contracts with many similarly situated individuals on background terms that are presumptively identical. However, certain key terms may be negotiated and tailored.

Two presumptions about contract must be rejected in interpreting parallel contracts. First, each contracting party – through the communicative acts that create a contract -- assumes obligations to a particular other party. A corollary of this principle is that contracts are tailored to their individual parties. These related presumptions are not fundamental to contract (given rules of assignment, third party beneficiaries, and trade usage of terms) but motivate interpretive rules that focus exclusively (or disproportionately) on communications between contracting parties and facts relevant to what a court might expect those two parties to have negotiated given their particular circumstances.

The second presumption of classical contract that must be rejected in cases of parallel contract is that contract terms are simultaneously set at a single moment of contract. While this view is not inconsistent with the recognized fact of contractual incompleteness, it tends to cause courts to fill in gaps at the designated moment of contract by assigning discretion to one party, and then to impose an unreasonably high burden for modification.

The Article has two aims. First, I will introduce the concept of parallel contract and explain how it captures an important model of contract that is separate from existing models. Contracts of adhesion challenge the presumption of a dyadic structure to contract, and

relational contract challenges the presumption of a discrete moment of contract, but each incorporates other assumptions that do not apply to parallel contract. Second, taking the case of parallel contract as illustrative, I will argue more generally that the process by which contracts are agreed upon and performed is highly relevant to how they should be regulated and enforced.

In particular, I will suggest that there are three fundamentally different ways of viewing contractual process – pure, perfect and imperfect. The view of contract one espouses has implications for which agreement courts should enforce and how.<sup>4</sup> In pure contract, a basic principle such as autonomy or the value of promise justifies enforcement of contract and shapes the rules of enforcement without regard to contractual outcomes. Case law continues to use the rhetoric associated with pure contract. Scholars who view the of contractual process as perfect, such as many legal economists, believe that the process of contract formation, including but not limited to the consent of the parties, gives rise to confidence that most contracts are value-generating and leave both parties better off than prior to contract.

Finally, in a view of contract as imperfect (the view advanced here), contract is an imperfect means by which parties attempt to regulate certain exchanges and relationships. Whether a given contract warrants deference on grounds of autonomy or whether it should be modified on welfarist or public policy grounds depends on context-specific considerations, because no general feature of contract justifies any uniform mode of contract enforcement.

If the process by which contracts are formed matters to the way we should enforce contracts, it follows that no single model of contract will suffice. There is too much heterogeneity among contracts. The classical picture of contract is not so much substantively flawed – some contracts comport with precisely that model – but it errs in its implicit claim

---

<sup>4</sup> See Melvin Eisenberg, *The Principle of Consideration*, 67 *Cornell L. Rev.* 640, 640 (1982) (“A promise, as such, is not legally enforceable. The first great question of contract law, therefore, is what kinds of promises should be enforced.”).

of singularity. Because the process of contract formation matters, no grand theory of contract will accurately capture the normative force of agreement and consistently deliver the most appropriate tools of interpretation.

The argument proceeds as follows. Part I describes the classical model of contract formation and the challenges to that model by the literatures on contracts of adhesion and relational contract. Part II introduces an alternative model, parallel contract, that captures the process of contract formation and execution in certain settings. Part II also shows how this alternative model of contract is appropriately governed by its own set of interpretive rules. Part III rejects pure and perfect theories of contract as too dogmatic and argues instead that interpretive rules and the models of contractual process on which they implicitly rely must be tailored to contractual context. Part IV concludes.

#### I. The Classical Model and its Existing Alternatives

In the classical account of contract, parties to contract negotiate their agreements. Those agreements impose a specified set of performance obligations on each party, and the obligations of each are carefully tailored such that the bargain could not be improved to their mutual satisfaction. The parties meet each other in the marketplace moments before contract, and they come with no standing obligations to the other.<sup>5</sup> The obligations they assume are not subject to modification unless the parties reenact the process of formation.<sup>6</sup>

---

<sup>5</sup> See Friedrich Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract*, 43 *Colum. L. Rev.* 629, 630 (1943) (in the classic picture “[e]ither party is supposed to look out for his own interests and his own protection. Oppressive bargains can be avoided by careful shopping around. Everyone has complete freedom of choice with regard to his partner in contract, and the privity-of-contract principle respects the exclusiveness of this choice. Since a contract is the result of the free bargaining of parties who are brought together by the play of the market and how meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole.”); Melvin Eisenberg, *Why There Is No Law of Relational Contracts*, 94 *Nw. U. L. Rev.* 805, 805 (2000) (classical contract law “was implicitly based on a paradigm of bargains made between strangers transacting on a perfect market”); Victor Goldberg, *Toward an Expanded Economic Theory of Contract*, 10 *J. Econ. Issues* 45, 49 (1976) (“The paradigmatic contract of neoclassical economics...is a discrete transaction in which no duties exist between the parties prior to the contract formation and in which the duties of the parties are determined at the formation stage.”); Gordon, *supra* note x, at 569 (“In classical contract, individuals have no obligations to each other save those created by the coercive rules of the state or their own promises.”). Cf. Daniel Friedman, *The Performance*

Two basic ideas about contract and its normative foundations stem from this picture. First, contracts are presumed to be robustly dyadic. One party makes an offer to a particular other party, who may accept or decline. This offer-acceptance sequence that takes place between two discrete individuals determines their respective obligations under the contract. The contract does not reflect obligations that run between persons other than the two parties. It does not inform the legal obligations or contractual behavior of either party with others.

Because of the presumption of dyadic relations, we tend to regard contracts as effectively tailored to two parties, and intentionally designed or otherwise assured to maximize their joint surplus. This confidence again derives from the process by which we envision contracts to have come about, either direct negotiations or a selection mechanism that culminates in one offeree accepting terms that another may have rejected,. There is no presumption that the transactional surplus is evenly divided, because the parties come to contract with different alternatives and thus disparate bargaining power. But the contract is the culmination of an efficient procedure: either an iterative market process by which an offeror locates an offeree for whom the proposed terms are optimal, or actual negotiation by which parties navigate respective preferences until they settle upon optimal terms. The process is of the kind which ensures that in the normal case no Pareto-superior improvement is possible.<sup>7</sup>

The second presumption of classical contract is that all contract terms are simultaneously set at a single moment of contract. While this view is not necessarily inconsistent with the recognized fact of contractual incompleteness, reconciling a

---

Interest in contract Damages, 111 L. Q. Rev. 628 (1995) (fundamental function of contract law is “the recognition and the ordering of entitlements created by the parties’ binding promises”).

<sup>6</sup> See Atiyah, *supra* note x, at 196 (“Contracts have a chronology, a time sequence...They are created first, and performed (or not performed) thereafter.”); Eisenberg, *supra* note x, at 807 (“Classical contract law focused almost exclusively on a single instant in time—the instant of contract formation—rather than on dynamic processes such as the course of negotiation and the evolution of a contractual relationship.”).

<sup>7</sup> The story is idealized in that no contemporary commentator would deny that transaction costs render the results of both negotiation and market sorting suboptimal from an allocative standpoint.

commitment to a privileged moment of contract (legal completeness) with the fact of (contingency) incompleteness causes courts to sometimes fill in gaps by assigning discretion to one party where the contract is silent, and to impose high hurdles for modification. The parol evidence rule too reflects the privileged status of the state of agreement at a particular moment in time. But while the parol evidence rule operates only in the case of written agreements, and excludes only some portion of communications that precede the magic moment, the primacy of what is said at the contractual moment over what is *subsequently* said and done is more pervasive. What is said or done after the contract is created does not usually speak to the parties' obligations under the given contract unless those words or events can be regarded as new moments of contract.

Contracts of adhesion and the scholarly and judicial effort to make sense of them have already shown us that the presumption of dyadic relations is misleading. Similarly, the concept of relational contract has emphasized the extent to which it may be arbitrary and potentially distorting to privilege a static body of communications as reflective of an agreement that evolves over the course of a contractual relationship. This Part considers in greater detail how the classic model is represented in doctrine, and how contracts of adhesion and the notion of relational contract have challenged the classic model. In the following Part, I show how parallel contract is an instance where neither of the classic presumptions hold, but which differs markedly from the models envisioned by contracts of adhesion and relational contract.

## 1. Classic model

Nobody takes the classical model of contract formation to be “true” in the sense of descriptively accurate, but judges and scholars may take the two ideas about contract that derive from that model to be normative if not descriptive truths. The two ideas animate core

doctrine, though the presumptions are also implicitly defeasible in light of more narrow doctrines.

The presumption that contracts are dyadic is evidenced first in the rules of offer and acceptance. Communications that are directed toward multiple individuals are less likely to be treated as binding offers that create a power of acceptance. In the case of unilateral contracts, specific notice of the offer by an individual offeree is necessary to accept through performance. The offer does not create a general power of acceptance when conveyed to the public in general; it only becomes an effective offer for any given individual when the elements of offer and acceptance that one would contemplate in dyadic relations are present.

The presumption of dyadic relations is most important in the rules of contract interpretation. Where a written document exists and its terms are unambiguous, there is simply no occasion to look outside of it. When a document is ambiguous, the court inquires what it was reasonable for each party to believe the other intended by her words and acts. The question is not what it would be reasonable for each party to believe her rights and obligations are under contract, should those differ from or simply cover more ground than her best guess as to the other party's state of mind. The words or acts of third parties or even of the parties in relation to third parties is relevant only where it helps to establish the universal meaning of a word, or the usage of a word within a trade. What others have said or have been told is important as evidence of the way words were used by the two parties to contract, never as direct evidence of the content of contractual obligation. Where one party is aware of the other's subjective understanding of a term, that meaning controls.

The second presumption that flows from the classic model is that obligations are set, even if not fully specified, at a discrete moment of contract. This presumption is fundamental to black letter law. First, there is no duty to negotiate in good faith – until there is a contract, there is no contract. Statements contemplating a bargain with a particular content are not

binding until there is evidence that the parties understood their agreement to be final – that is, contractual. The very fact that negotiations are undertaken with the aim of concluding a contract at a later point render commitments made in the course of the negotiations unenforceable where they otherwise might be, e.g. under promissory estoppel (the anomalous case of *Red Owl* notwithstanding).

Second, the view of contract as a special moment is consistent with the doctrine of consideration, which makes difficult both modification of contractual obligation and the enforcement of additional commitments as free-standing promises.<sup>8</sup> Although modification is now possible without consideration, it is only enforceable where it is apparently motivated by a desire to avoid losses threatened by new circumstances; even new commitments that are not *prima facie* revisions of earlier commitments are treated as revisions of a completed bargain subject to these rules of modification.<sup>9</sup> Nor is it usually possible to enforce additional commitments made by one party to an agreement without reference to the previous bargain. Under promissory estoppel, the very fact of that earlier bargain will make it difficult to show that the promisee relied on the additional commitment, since reliance will often take the form of conduct that overlaps substantially with the performance obligations of the promisee under the original bargain.<sup>10</sup> Moreover, commitments made by a party after a contract has been formed that were contemplated by that agreement are not treated as further specification of that party's obligations but instead as exercise of discretion with respect to the fulfillment of the unspecified obligation. The effect is that the party exercising discretion retains the right

---

<sup>8</sup> While I focus here on the legal impediments to adjusting a contractual relationship, perhaps in part because of these hurdles, in practice adjustments are also unlikely to be self-consciously undertaken with the aim of revising the legal agreement. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc. Rev.* 55, 61 (1963) (“the creation of exchanges usually is far more contractual than the adjustment of such relationships and the settlement of disputes.”).

<sup>9</sup> Distinguish, for example, a commitment to pay \$200 instead of \$100 for an item from a commitment to allow time off for an employee without reducing compensation previously set by an employment agreement.

<sup>10</sup> For example, if an employer promises an employee a holiday bonus where the employee already operates under an employment contract, the employee may have difficulty showing that she relied on that promise given that she was already obligated to work in the relevant period under the terms of the existing contract.

to revise that commitment unilaterally at a later point so long as its later position would have been consistent with the general obligation initially assumed.<sup>11</sup>

Finally, because contracts are incomplete with respect to the states of the world they contemplate, courts' insistence on the legal completeness of contracts leads them to construct legal obligations solely on facts available to the parties "at the time of contract." Thus, when a negative contingency arises that substantially alters the value of the agreement for one of the parties, courts cannot offer relief before asking whether it would be reasonable to assign risk of the contingency to that party under the initial agreement.<sup>12</sup> Where the scope of a party's obligation is unclear and the court must provide a default rule, courts usually imagine the term that the parties would have struck had they expressly bargained with respect to the contingency in question at the time of formation – sometimes to the point of extending the advantage of the more powerful party on the grounds that its bargaining power would have informed bargaining on the hypothetical term.<sup>13</sup> Defaults may be more or less tailored to the parties, but they are never tailored to the parties as they are constituted at the moment of dispute but rather to their situations at the time of contract formation.

The classical model of how contracts are formed thus has concrete implications for how contracts are enforced. The claim here is not that these various doctrines are simply ideological<sup>14</sup>. For example, there are strong efficiency considerations that cut in favor of many of these rules. But the force of those reasons, and our confidence in them, turns on the

---

<sup>11</sup> For example, an employer that assumes an obligation to provide health benefits might initially offer a generous plan but then unilaterally substitute an inferior one. By contrast, if the initial offering were treated as a specification of the obligation to provide benefits, once specified the obligation could not be unilaterally revised.

<sup>12</sup> See Restatement Section 152. Cf. Atiyah, *supra* note x, at 217 ("Frequently, it is the interpretation of the law which converts a simple postponed exchange into a risk-allocation exercise, rather than any deliberate intent of the parties.").

<sup>13</sup> See Omri Ben-Shahar, A Bargaining Power Theory of Default Rules 109 *Colum. L. Rev.* 396 (2009) (advocating default rules which reflect the balance of bargaining power at the time of contract).

<sup>14</sup> In this important respect my claims differ from those of the critical legal studies movement with respect to contract.

background model of contract.<sup>15</sup> For example, the benefits and costs which speak to the breadth of evidence a court will entertain will vary depending on the availability of particular kinds of evidence and the availability of various limiting principles. The benefits and costs of imposing liability based on communications prior to or subsequent to formal execution of an agreement will turn on how contracts are normally formed and how parties behave in the course of performance. There is no straightforward way to deduce optimal rules from actual behavior, but the former is nonetheless dependent on the latter. When we say that contract law presumes the classical model of contract formation, we mean that the normative appeal (efficiency or otherwise) of various rules presumes that model.

Still, the presumptions which flow from that model are sometimes relaxed. We relax the presumption of dyadic relations in several doctrines that are not commonly regarded as central to contract law as a whole, including the rules of assignment, delegation and third party beneficiaries. These doctrines are often excluded from first-year contracts courses. But a presumption that most contracts are assignable and delegable does imply that the identity of parties to contract is not sacred or essential to their bargain. The possibility of vesting rights in third parties, though possible only where the parties themselves are deemed to have intended to create such an enforceable interest, also admits that contractual relations are not strictly dyadic.

More important, contracts can be interpreted with reference to the world outside the contractual relationship. Trade usage is taken to inform how the parties themselves are likely to have used terms in a written agreement. And where the parties fail to specify a term

---

<sup>15</sup> Cf. Avery Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 *Colum. L. Rev.* 496, 498 (2004) (“for the past one hundred years or so the historical trend across the board has been to water down such formal doctrines in favor of a more all-things-considered analysis of what the parties may have meant in the individual case”).

like price, courts may presume that the parties intended to contract on terms that are in line with the market in which they are situated.

The second presumption, of legal completeness at formation, is also relaxed in the doctrines of the duty of good faith, modification, changed circumstance, and in the significance assigned to course of performance. The duty of good faith is interpreted to restrict the parties' ability to usurp opportunities they bargained away *at contract formation*; but it does allow courts to disallow specific conduct that was not addressed with particularity in the initial agreement.<sup>16</sup> Although the restrictive character of the rules of modification ultimately reinforce the picture of a complete legal bargain at formation, they do at least allow parties to revise that bargain where they expressly undertake to do so. Where circumstances are sufficiently changed – where they rise to the level of impossibility or impracticability – parties may be excused from performance altogether. Avoidance of an obligation under changed circumstance depends on a finding that the parties did not contemplate the negative contingency that materialized, and in that sense acknowledges the reality that the terms of the agreement do not cover the infinite expanse of possible events.

Finally, courts allow *ex post* course of performance to inform interpretation of ambiguous terms and also to inform validity of a contract where there is doubt on grounds of indefiniteness. Actual conduct can also result in constructive waiver of even express conditions. In the doctrines relating to course of performance and waiver, courts are most clearly prepared to abandon the fiction that all rights and obligations are fixed at the time the contractual relationship is initiated. But these are relevant only where the underlying agreement is ambiguous or where there is inconsistency between the parties' actual and contemplated conduct.

---

<sup>16</sup> The more incomplete an agreement, the larger the role played by the duty of good faith. Cf. Richard Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 *Northwestern L. Rev.* 823, 846 (2000) (advocating expansion of duty of good faith to help parties maintain long-term relational contracts).

The two presumptions I am imputing to classical contract law are not dogmatic, as the above discussion shows.<sup>17</sup> They are presumptions rather than assumptions because they are defeasible. Moreover, the presumptions serve a number of useful purposes in many contexts. The contention here is neither that they have been arbitrarily adopted nor that they are categorically false. The point is instead that the utility of the presumptions, and the appropriate conditions required for rejecting them, depend on contingent aspects of the contractual process.

## 2. Contracts of Adhesion

The term “contracts of adhesion” describes a real-world phenomenon; it is neither an idealized model of contract formation nor a theory of contract intended to illuminate contractual practices generally. But the model of contract it describes is so radically at odds with the classical model that it both exposes *that* model as idealized (or at least, unreal) and throws into relief even those contracts which it does not describe directly.

Contracts of adhesion are standard form agreements drafted by one party who uses that form in numerous transactions.<sup>18</sup> The “adhering” party not only cannot negotiate but usually has not read or understood many of the terms on the standard form.<sup>19</sup> Often no other terms are available on the market. Consumer assent to these transactions is not voluntary in the robust sense that voluntariness is pictured in the classic model of contract.<sup>20</sup>

---

<sup>17</sup> Contract theory premised on the classic model is far more dogmatic than doctrine. See Oliver Wendell Holmes, *The Common Law* (describing the course of law as essentially pragmatic); see also *supra* Part III (discussing pure theories of contract).

<sup>18</sup> Todd Rakoff, *Contracts of Adhesion: an Essay in Reconstruction*, 96 *Harv L Rev.* 1173, 1177 (1983) (describing seven characteristics of contracts of adhesion).

<sup>19</sup> *Id.* at 1179.

<sup>20</sup> See Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 *Mich. L. Rev.* 1223, 1231 (2006) (“The idea of voluntary willingness first decayed into consent, then into assent, then into the mere possibility or opportunity for assent, then to merely fictional assent, then to mere efficient rearrangement of entitlements without any consent or assent.”); Rakoff, *supra* note x, at 1180 (“Because contract law is rationalized in large part on the voluntary assumption of obligation – or on the reasonable appearance thereof --- it cannot be applied in an automatic and straightforward manner to contracts of adhesion”).

Of course, courts could have simply declined to enforce standard form contracts as legally binding in light of their departure from the ideal process of contract formation.<sup>21</sup> But contracts of adhesion are never denied enforceability altogether. Courts sometimes do refuse enforcement of particular terms; more often, they either enforce them as written or enforce them within bounds.<sup>22</sup> This is because the idealized process from which standard form contracting departs is not only a fiction, it is not properly taken as even an ideal. The absence of meaningful assent by consumers to standard form contracts is problematic because we are not prepared to do without these contracts, or to correct even those features most at odds with the classic model and its vision of fully voluntary (and informed) assumption of obligation.<sup>23</sup> Instead, courts have been generally prepared to treat consumers' willingness to transact on the basis of a standard form agreement as consent to all the terms within those agreements.<sup>24</sup>

Although the focus of the literature on contracts of adhesion has been on the difficulty of establishing consent to contract by the consumer, mass contracts challenge the classic model on another dimension as well: the dyadic character of the contractual relation.<sup>25</sup> There

---

<sup>21</sup> See Rakoff, *supra* note x, at 1284 (“Contract law is inherently based on broad generalization about how social units interact with each other, and about what institutional forces control these interactions. When applied to the typical circumstances in which contracts of adhesion are used, the generalizations incorporated in ordinary law are far removed from the forces that actually define how the parties are situated.”).

<sup>22</sup> See Llewellyn, Book Review, 52 Harv. L. Rev. 700 (1939) (“where bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.”); Omri Ben-Shahar, Fixing Unfair Contracts, 63 Stan L. Rev. 869, 70 (2011) (courts often substitute a minimally tolerable terms for an unacceptable one).

<sup>23</sup> See Douglas Baird, The Boilerplate Puzzle, 104 Mich. L. Rev. 933, 939 (2006) (“Hidden product attributes over which sellers given potential buyers no choice are a commonplace, necessary, and entirely unobjectionable feature of mass markets.”). Many scholars have defended terms which initially came under attack as actually beneficial to consumers. See Akerlof, The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism, 84 Q. J. Econ. 488 (1970) (even unfavorable warranty terms may provide information to consumers about the liability of products); George Priest, A Theory of the Consumer Product Warranty, 90 Yale L.J. 1297, 1298 (1981) (viewing warranties as “contract that optimizes the productive services of goods by allocating responsibility between a manufacturer and consumer for investments to prolong the useful life of a product and to insure against productive losses”).

<sup>24</sup> See TK. Llewellyn, The Common Law Tradition 370 (suggesting that adhering party can be understood to give “blanket assent (not specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms”).

<sup>25</sup> Cf. Baird, *supra* note x, at 951 (“Much of the view of the problem is a view of the law that reduces everything to rights that A and B have against each other. From here, it is but a short step to view any troublesome transaction in which there is boilerplate to be the result of boilerplate and the absence of a fully dickered bargain between two equals.”).

is nothing importantly binary about the relationship between parties to a standard form agreement. In fact, standard form contracts make the identity of at least one party to the contract (consumer) entirely irrelevant; often, it is never revealed to the other. The identity of even the drafting corporation may be of limited relevance to the process of contract formation – and by implication, to deciphering the meaning of terms -- where the form is standardized across an industry, or where certain clauses or terms are used across markets for very different goods and services.<sup>26</sup>

Standard form contracts are in every meaningful way products of the mass markets in which they appear. They reflect the market behavior of many individuals. Individual consumer understanding of them depends entirely on their prior experience in that market, as well as their direct communications with other consumers. Contracts of adhesion are at once recognizable as contract but grossly inconsistent with the classic model of contract. The result is to demonstrate concretely the contingency and limited applicability of the classic model. In particular, it reveals as implausible the presumption that communications between parties to a contract are always important to the content of their agreement and the primary basis of their respective understandings as to that content.

### 3. Relational Contract

If contracts of adhesion have made salient the porous personal boundaries of contract, relational contract theory has highlighted the artificial character of the temporal boundaries of contract. The language of a “meeting of the minds” has been dismissed as implying a subjective test of assent to contract. But the picture of minds connecting has had a lasting effect. If we now see that the meeting of minds is too high an aspiration (and not the morally

---

<sup>26</sup> See Mark Patterson, Standardization of Standard Form Contracts: Competition and Contract Implications, 52 William & Mary L. Rev. 327 (2010) (discussing anticompetitive concerns raised by coordinated standardization by competitors); Robert Scott, The Case for Formalism in Relational Contract, 94 Northwestern L. Rev. 847, 860 (2000) (“Over time...the stock of standardized terms and conventions that have been tested by judicial interpretation in contract disputes will increase.”).

relevant standard), the concept itself acknowledged the improbability of subjective agreement by modestly limiting the expectation of such agreement to a passing moment. If minds can meet, they will not engage for more than a moment. We continue to speak of that contractual moment though the modern language of reasonable inference does not require it. In fact, as relational theory emphasizes, parties' reasonable understandings and expectations of each other are developed over time, over a period that begins well before the finalizing of an agreement and that extends through the course of performance.

Relational contract theory rejects several assumptions in the classical model, and on its primary claim could be taken to be its characterization of the contractual relationship as a meaningful relation subject to a rich array of thick norms that are not reflected in any document or even the parties' conscious understanding of their legal obligations. One of the founders of relational theory, Ian Macneil, defines relational theory to hold that "every transaction is embedded in complex relations" and requires "understanding all essential elements of its enveloping relations."<sup>27</sup> Although complex relations need not be positive or worthy of either deference or support, the relational picture of contract is sometimes a rather rosy one. Relationalists tend to emphasize the ways in which parties intend to cooperate with one another, even maximizing joint rather than individual utility.<sup>28</sup> They tend to view the norms governing relationships as jointly produced and symmetrically applied.

In calling for contract law to attend to the relationship between contracting parties, relational contract theory tends to underemphasize the hierarchical quality of many

---

<sup>27</sup> Ian Macneil, *Relational Contract Theory: Challenges and Queries*, 94 *Northwestern L. Rev.* 877, 881 (2000).

<sup>28</sup> See David Campbell and Donald Harris, *Flexibility in Long-term Contractual Relationships: the role of Cooperation*, 20 *J. of L. & Soc.* 166, 167 (1993). Macneil views contracts as characterized by interdependence, *supra* note x, at 1032-33, that amounts to solidarity, *id.* at 1034. "The most important aspect of solidarity [for his immediate purposes] is the extent to which it produces similarity of selfish interests, whereby what increases (and decreases) the utility of one participant also increases (decreases) the utility of the other." *Id.* at 1034.

contracts.<sup>29</sup> Although it purports to be about actual norms, it often would seek to create relations of a sort that do not yet exist.<sup>30</sup> Contract law is not just supposed to pay attention to the underlying relationship; the implicit hope is that it will reform it.<sup>31</sup> The Macaulay-brand of relationalism is more sensitive<sup>32</sup> than Macneil to the oppressive dimensions of many social relations that lie beneath contract, and others who have challenged the classical contract model along similar lines have emphasized the ways in which long-term relationships against a background of inequality engender special risks.<sup>33</sup>

Since the long-term character of some contractual relationships can be the basis for either solidarity or oppression, the relational move toward enforcing or even just taking into account the norms immanent in background relations is problematic. Even where background norms do not merely entrench hierarchical relations, those norms may depend on their unenforceability for their efficacy<sup>34</sup>, or they may simply be illusive to courts.<sup>35</sup> That

---

<sup>29</sup> See, e.g., Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 Duke L.J. 1, 4-5 (describing long-term contracts as typically between parties of relatively equal bargaining strength who eschew formalities in part because they are familiar and comfortable with each other); Jay Feinman, *Relational Contract Theory in Context*, 94 Nw. U. L. Rev. 737, 756 (listing many “relational standards” that would be relevant to relational approach to contract enforcement, including “essential attributes” of a role or status, balanced reciprocity, encouragement of trust, and “the whole range of social policies and values other than those that grow out of the relationship”).

<sup>30</sup> See Jay Feinman, *Critical Approaches to Contract Law*, 30 UCLA L Rev. 829, 857-60 (1983) (describing possibility of a utopian contract law and its alternative vision of the individual and her relations with others). Cf. Mensch, *Freedom of Contract as Ideology*, 33 Stan. L. Rev. 753, 772 (1981) (“Of all the legal categories which were generated, perhaps freedom of contract appealed most directly to the utopian element of liberalism—the belief in the potential of human freedom to form a basis for social organization.”).

<sup>31</sup> See Feinman, *Relational Contract*, supra note x, at 748 (“relational theory focuses on the necessity and desirability of trust, mutual responsibility and connection. Not all of these bonds should be legally enforceable, but beginning analysis by recognizing them is likely to produce a broader set of obligations”).

<sup>32</sup> Macaulay sees contract as continuous with political struggle and is pessimistic about the ability of weaker parties to transform hierarchical contractual relations into more egalitarian ones. See Robert Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 Wis. L. Rev. 565, 571.

<sup>33</sup> “In the messy and open-ended world of continuing contract relations, where the contours of obligation are constantly shifting, the effects of power imbalances are not limited to the concession that parties can extort in the original bargain. Such imbalances tend to generate hierarchies that can gradually extend to govern every aspect of the relation in performance. This is the potential dark side of continuing contract relations, as organic solidarity is the bright side: what starts out as a mere inequity in market power can be deepened into persistent domination on one side and dependence on the other.” Id. at 570.

<sup>34</sup> Robert Scott, *A Relational Theory of Default Rules*, 19 J. Leg. Stud. 597, 615 (1990) (“It may be that the great lesson for the courts is that any effort to judicialize these social rules will destroy the very informality that makes them so effective in the first instance.”).

said, there are surely some relations in which rich background norms reflect meaningful relations that the state would do well to support. But these represent but some fraction of contractual relations more broadly. While the emphasis of relational contract theory on the underlying, wholistic relationship that underpins contract may be important to understanding this subset of contract, these cases are at the periphery of contract.<sup>36</sup>

The more important and general insight is that the obligations of parties are not settled at a single moment of contract. The centrality of *that* insight to the theory is such that contracts are often defined as relational to just that extent that their extended duration prevents parties from fully specifying their respective obligations *ex ante*.<sup>37</sup> This rejection of the presumption of temporal boundedness in the classical model is of profound import and has had deep influence, to the point where most contract theorists now describe themselves as relationalists – even if they would not advocate the incorporation of background relational norms into the set of binding contractual obligations courts enforce.<sup>38</sup>

## II. Parallel Contract

---

<sup>35</sup> Richard Craswell, *The Relational Move: Some Questions from Law and Economics*, 3 S. Cal. Interdisc. L.J. 91, 109-10 (1994) (theories that seek to give effect to parties' "tacit assumptions" require reconstruction of assumptions for which there is no direct empirical evidence); Robert Scott, *The Case for Formalism in Relational Contract*, 94 *Northwestern L. Rev.* 847, 848 (2000) ("If...the state is simply incapable of supplying parties in a complex economy with useful defaults *ex ante* or imposing fair outcomes *ex post*, the better instrumental strategy is for courts to accept the limits imposed by legal formalism and interpret the facially unambiguous terms of disputed contracts literalistically.").

<sup>36</sup> See Aditi Bagchi, *Separating Contract and Promise*; Daniel Markovits, *Solidarity at Arms-Length*; Dori Kimel, *From Promise to Contract*. But see John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 *Feminist L. Stud.* 93, 127 (2000) (relational theory has "pointed the way toward the possibility of using the law of contract to underpin the legal recognition of intimate relationships outside marriage").

<sup>37</sup> Charles Goetz & Robert Scott, *Principles of Relational Contracts*, 67 *Va. L. Rev.* 1089, 1090, 1091 (1981) ("Parties frequently enter into continuing, highly interactive contractual arrangements" and "[a] contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations."); Lewis Kornhauser, *The Resurrection of Contract*, 82 *Colum. L. Rev.* 184, 190 (1982) (summarizing Macneil's criteria as "the transaction extends over time, (2) parts of the exchange cannot be measured or specified precisely [*ex ante*], and (3) the interdependence of the parties to the exchange extends at any given moment beyond any single discrete transaction to a range of social interrelationships."); Speidel, *supra* note x, at 798 ("Relational contracts continue over an extended time...[P]atterns of interaction and expectation develop that transcend the boundaries of the traditional discrete bargain.").

<sup>38</sup> See Randy Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contracts*, 78 *Va. L. Rev.* 1175, 1200 (1992) ("To a significant degree, we are all 'relationalists' now.").

Parallel contract incorporates the two key insights of contracts of adhesion and relational contract, respectively. First, contracts need not be robustly dyadic; communications of either party with third parties is important to their respective understanding of their agreement. Second, contractual obligations are not conclusively settled at a single moment of contract. Agreements are not just incomplete in the technical sense that terms were not drafted to address all possible contingencies. They are also obligationally incomplete in that obligations under an agreement are not settled at the moment of its inception— not simply ill-defined, but indeterminate.

Casting doubt on the robust dyadic structure of contract should not be construed as a challenge to the bilateralism of contract law, which is characteristic of private law more generally. Private law theorists of all stripes have emphasized, in contrast to economic approaches to private law, that the distinguishing feature of private law is that individuals are empowered to bring claims against particular other individuals, and courts self-consciously adjudicate those claims based on reasons that pertain to the rights and obligations of the parties to each other. Contract law does not purport to resolve disputes with direct reference to the effect of litigation outcomes on actors other than the litigants in a given dispute.

However, the bilateralism of contract law, like that of private law generally, does not imply that the content of rights and duties of parties to one another are not informed by others, including their past and future conduct and their values. No viable theory of private law conceives of the rights and obligations of parties to one another entirely divorced from social context. Almost every theory will take into account, for example, whether conduct is reasonable in light of prevailing practices, or whether a legal rule is likely to make such conduct (by others) more or less frequent going forward. These considerations are usual in the tort context, even among those committed to theorizing the institution of tort in a way that is consistent with the internal perspective of tort as essentially bilateral.

Contract law is bilateral in the sense that is characteristic of private law broadly. What I challenge here is the notion that the content of rights and obligations between contracting parties is set by reference solely to the acts and words of those parties in relation to each other. The point is obvious inasmuch as we see that parties reasonably construe the obligations they assume toward one another based on the meaning of words and acts more generally. But in theory and practice we have been reluctant to acknowledge that what others do and say is significant not just because it informs how parties to a given contract understand each other, but to how they understand their contract with each other. This has been most apparent in the context of contracts of adhesion, but the point carries to the situation of parallel contract.

Although contracts are not necessarily personally or temporally bounded in the way the classical model suggests, they are not unbounded either. Courts must have some limiting principle by which they ascertain the obligations of parties and the universe of evidence relevant to that inquiry. In this Part I propose parallel contract as one repeat model of contract with its own set of appropriate enforcement norms.

Parallel contract occurs when one party (“central party”) enters into a series of agreements with many other individuals (“contractees”) on terms that are substantially overlapping. Certain key terms may vary but contractees expect that most of their contract terms are identical to those of other contractees.

In the contractual processes of parallel contract, the central party sets most terms unilaterally, especially those terms which the contractee comes to expect are parallel as among contractees. Terms are not typically negotiated and in fact, contractees’ understanding of their rights and obligations under contract are based primarily on their communications with each other. Because the transaction costs associated with negotiating or even unilaterally tailoring terms to contractees is excessive in proportion to the benefit

derived from such tailoring, the central party tends to set the substance of most background terms based on facts pertaining to contractees as a group, including the mean and distribution of contractees' preferences and capabilities.

In interpreting contracts of adhesion, several commentators have suggested that courts should not just ask how consumers would reasonably construe written terms but how consumers would reasonably understand the agreement; the latter is more obviously informed by their experiences in the market, including their interactions with other consumers. Similarly, in parallel contract, courts should ask not just how localized practices within a firm might have informed a contractee's understanding of the central party's words and acts to that contractee, but how communications between the central party and other contractees, and between contractees, reasonably affected a given contractee's understanding of her agreement with the central party. Once the contractee's understanding of what the central party has said to her does not have to be the route of relevance for all external communications, there is at least less reason to restrict the universe of evidence to that which preceded the last communication between the central party and the particular contractee.

Parallel contract is not usually simultaneous. That is, contractees do not enter into contract with the central party at the same time. However, the chronological priority of a given contractee does not imply that either the central party or any subsequent contractee understands their legal obligations to be controlled by the terms of the first agreement. Instead, contractees expect homogeneity in the background terms of their own and other contractees. Each additional contractee expects her preferences and capabilities to be as relevant to the common terms of her agreement as those of any other contractee, but on the margin she does not expect to be the but-for cause of any particular change in terms. Thus, the expectation will be that terms will gradually evolve as the set of contractees (and prospective contractees) and their related preferences and capabilities evolve, and as well as

the preferences and capabilities of the central party. The present obligations of parties to parallel contract are determinable at any given moment but are subject to ongoing revision by the central party.

Revision does not take place through deliberate modification. In fact, continuously updating the agreement in a self-conscious manner would be subject to precisely those transaction costs which the central party avoids by applying common terms to all contractees. Instead, the parties' understanding as to their rights and obligations evolves through the cumulative effect of the myriad decisions taken by the central party in the course of performance of its parallel contracts. The implication for interpretation is that communications and practices of the central party are evidence of its obligations toward contractees even in the absence of evidence that the central party specifically intended to revise its obligations toward all contractees.

The notion of parallel contract is intended to build off the existing concepts of contracts of adhesion and relational contract. However, parallel contract departs from the descriptive picture behind each concept and presses separate normative concerns. Contracts of adhesion are distinct from parallel contracts in that the latter are (1) not mass in scale (2) not open to all (3) one or more terms may vary, and (4) there is no anonymity for either party.<sup>39</sup> The core normative challenge with respect to contracts of adhesion has been the quality of consent by consumers; by contrast, the concept of parallel contract is not intended to illuminate or solve any problem of consent. Parallel contract differs from relational contract in the felt absence of solidarity; relations are at arms-length, asymmetrical, and

---

<sup>39</sup> Rakoff would disqualify the typical parallel contract as a contract of adhesion because one of the distinguishing features of contracts of adhesion in his view is that the "principal obligation of the adhering party in the transaction considered as a whole is the payment of money." Rakoff, *supra* note x, at 1178. This requirement "eliminates certain interactive relationships that might also be evidenced by standard forms used on a nonnegotiable basis, but in which the drafting party may be constrained by the continual need to generate cooperation and effort on the part of the adherent. Certain long-term business relationships and some employment contracts fall within this excluded category." *Id.*

neither party trusts the other by choice.<sup>40</sup> Nor does parallel contact presume or show that such solidarity is the appropriate ambition of contract law. Nevertheless, the notion of parallel contract should extend certain insights from the literatures on contracts of adhesion and relational theory. And just as a few rules of formation and interpretation have adjusted to those aspects of contractual reality revealed by the concepts of contracts of adhesion and relational contract, the concept of parallel contract should dislodge interpretive paradigms that have persisted in the face of poor fit with the classical model its particular context.

The best example of parallel contract occurs in the employment context.<sup>41</sup> Large employers enter into contracts with numerous employees without specifying all terms, such as leave or termination policies. Employees' understanding of those terms are appropriately interpreted as they are understood by employees, in light of a practice of parallel contract. The practical consequence would be that employers should be held to consistent terms and practices regardless of whether employees can demonstrate that those practices were specifically intended by the employer to be legally binding in their individual cases.

We have learned from contracts of adhesion that we can (and do) hold parties to terms based on a theory of blanket authorization. That a consumer has chosen to go forward with a transaction with limited knowledge as to the specific terms of contract but often with access to related information from other consumers or transactions with other retailers or manufacturers is enough to validate the standardized agreement. Similarly, an employer can be understood to have consented to an employment relation in which it has not self-consciously bought into each of its specific obligations. And the content of those obligations vis a vis any single employee may be determined with reference to communications and events outside of that bilateral relation. Although not every norm of a relationship is

---

<sup>40</sup> Consider the German expression: "Vertrauen ist gut. Kontrolle ist besser." (Trust is good. Control is better.)

<sup>41</sup> Cf. Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 *Nw. U. L. Rev.* 823, 826 (2000) ("In a contract of employment, modern contract law assumes that the bargain between employer and employee is independent of context unless there is proof that the agreement is supplemented by norms and practices from the context or regulated by state or federal legislation.").

appropriately regarded as legally binding, the lesson from relational theory is that in a case like parallel contract legal obligations are not set out *ex ante* and can only be deciphered by reference to words and acts over the course of performance. While there are relations in which thick norms might be undermined by legal enforcement, parallel contract occurs where relations are arms-length for legal purposes; the law has reason to presume or operate as if individuals are business actors and do not intend to assume obligations or acquire rights of the sort whose value turns on voluntary compliance.<sup>42</sup>

Because obligations in parallel contract track the words and acts of the central party, that party is able to avoid inadvertently ratcheting up her obligations by simply declaring that words and deeds directed at a given contractee do not reflect on the central party's agreement with other contractees. (The rules of parallel contract are default rules.) However, the central party must issue disclaimers with each communication or conduct that could revise her

---

<sup>42</sup> Parallel contract is rarely characterized by formalized mechanisms for enforcing norms outside the law, such as would justify an inference that the initial agreement did not contemplate amendment through subsequent words and acts. Cf. Ronald Gilson, Charles Sabel, and Robert Scott, Braiding: The interaction of Formal and Informal Contracting in Theory, Practice and Doctrine, 110 *Columbia L. Rev.* 1377, 1384 (2010) ("contracting parties can and do agree on formal contracts for exchanging information about the progress and prospects of their joint activities, and that these same information exchanges provide the foundation for raising the existing levels of trust. It is this information-sharing regime that braids the formal and informal elements of the contract, endogenizes trust, and thereby supports the informal enforcement of the parties' substantive performance"). For example, employers are not usually required to provide information to employees that would establish a framework for resolving legal gaps in the agreement as they arise. Instead, gaps are filled by the employer unilaterally.

The classic interpretation would read the absence of any restraint on discretion in the initial agreement as signaling an allocation of discretion constrained only by good faith. But such an allocation is at odds with the usual understanding of the employee, and lacks any normal mechanism for motivating compliance even with the loose requirement of good faith. See Aditi Bagchi, Unions and the Duty of Good Faith in Employment Contracts, 112 *Yale L.J.* 1881 (2003); cf. Gilson et al, *supra* note x at 1386 ("making parties' capabilities and character observable...serves to raise switching costs that support informal enforcement of the parties' substantive obligations").

Either the employer has no obligation because he has been allocated control, or his unspecified obligations are of the same type (i.e. legal) as those which are detailed; there is no reason to believe that the parties have carved up obligations into legal and nonlegal varieties where the apparent basis for their failure to specify was merely the cost of doing so *ex ante*. The inference that unspecified norms were intended to be nonbinding follows only if we presume that all legal obligations are specified *ex ante*.

obligations; it would not be adequate to issue such a disclaimer once at the time of initial contracting since legal obligations are not settled then.<sup>43</sup>

The effect may be that parallel contract in the employment context will result only in an endless wave of disclaimers on the part of employers. But these disclaimers will come at a cost to employers and result in a corresponding benefit primarily -- though not exclusively -- realized by employees.<sup>44</sup> The cost to employers is that employees will no longer operate on an inflated understanding of their rights; this may result in less employee loyalty, and perhaps, more shirking. But these costs flow from an intrinsic and instrumental good: transparency. Employees will have a clearer understanding of their legal employment relations. Knowledge of the truth is a human value, knowledge of legal truths is of distinctly legal value, and the more rational decision-making that it enables is of economic value to employees and others whose welfare is hinged to the efficient operation of labor markets.

### III. The implication of the contractual process for contract enforcement

My argument thus far has been that two assumptions about contract that arise naturally from the classical picture of contract formation fail to hold in cases of parallel contract. First, parallel contracts are neither contained nor robustly dyadic. Communications between each party and others outside of a given contract are as important to shaping the parties' evolving understanding of each other's obligations as are direct communications between the parties, which are often chronologically prior to their communications with others.

---

<sup>43</sup> Requiring the central party to issue disclaimers is a burden that existing law would not impose on an employer that wishes to avoid certain liability. But this additional cost of achieving one's preferred employment regime is but one factor in the choice of a default regime, it does not put such a regime so outside the power of an employer as to render the default regime involuntary. Cf. Alfred Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 Va L Rev. 1178, 1185 (1964) ("lack of enforceability undercuts only part of the effectiveness of contract as a means of ordering relations between individuals. That it is an important part is obvious. But, the protection of party expectation and reliance is at stake; freedom is not.").

<sup>44</sup> These results of the interpretative paradigm help justify taking into account contractual process. See Edwin Patterson, *The Interpretation and Construction of Contracts*, 64 Colum. L. Rev. 833, 852, 855 (1964) ("courts often state that a contract will be so interpreted, if possible, as to attain a result that is fair to both parties, rather than one that is unfair" and "[i]f a public interest is affected by a contract, that interpretation or construction is preferred which favors the public interest.").

Second, contracts are not substantially tailored to individual parties. Only the most important terms (e.g. salary in the employment context) are negotiated and set with respect to information specific to a given employee. Most terms in such contracts are presumptively parallel with those of many other individuals. Because individuals often lack any other basis for deciphering the content of many contractual terms, it is reasonable for them to look at how similarly situated parties contracting with the same single contractual partner have fared, as evidence of their own rights and obligations.

In comparing the classic picture of contract formation with those advanced by contracts of adhesion, relational contract and parallel contract, respectively, my implicit claim has been that the process by which a contract is formed has implications for how it should be enforced.

Although this claim is similarly implicit in the literatures on contracts of adhesion and relational contracting, and in the scholarship on consumer and employment contracting more generally, high contract theory tends to eschew the possibility that banal facts about how various contracts come into being could say something important about the normative force of agreement. The fact of agreement itself, or the bare presence of consent (however thin) justifies enforcing a contract, and sometimes also motivates a choice of interpretive rules.

If a fundamental principle like autonomy or the sanctity of promise can do the work they are called upon to do, it may indeed be irrelevant (or at least, less relevant) to contract law whether parties fully understand the terms they sign onto, whether they had meaningful alternatives, whether they come to expect, based on prevailing practice, that the other party's conduct will comply with norms other than those which were expressly stated at the time of initial contracting, in what ways the terms of a given contract may affect the terms on which others are likely to contract, and whether considerations of public policy, including distributive justice, should favor certain terms over others. Each of these kinds of facts may

be relevant in a theory of contract that centers on concepts like autonomy or promise. But especially where autonomy is conceived at a high level of abstraction, or where contractual promise is but one instantiation of a larger promissory principle, the emphasis will be on what a party who consents with less information and fewer options has in common with another party who has more information and more options, rather than on the differences between them and the contracts into which they enter.<sup>45</sup>

We can understand the distinct stances scholars take on the significance of process-facts (beyond bare consent) to fall into three types.<sup>46</sup> These actually amount to three fundamentally different ways of viewing contractual process, which I will call pure, perfect and imperfect.<sup>47</sup> These labels are intended to roughly track the distinction introduced by John Rawls between pure, imperfect and perfect procedural justice. The results of a procedure characterized by pure procedural justice are self-justifying; the procedure itself defines a just outcome. The classic example is a coin toss. If the process is appropriate to the end for which it is used and executed fairly, there is no exogenous criteria to bring to bear in assessment of the outcome. By contrast, in perfect procedural justice, there is some independent criterion for what constitutes a just outcome, and the procedure is perfectly designed to arrive at that outcome. For example, having two children with equal claims to a cake divide that cake by assigning one child the role of slicing it into two parts and allowing

---

<sup>45</sup> Arthur Leff made essentially this point when he argued that recognizing standard form contracts as contracts tends to obscure the full import of the lack of dealing behind contracts of adhesion, because we presumptively treat contracts as if “the product of a joint creative effort.” *Contract as Thing*, 19 Am. U. L. Rev. 131, 138 (1970). More generally, he observed that contract is not a natural classification but a grouping of dissimilar transactions. *Id.* at 132.

<sup>46</sup> I take every theory of contract to imply some view of the contractual process, whether directly justified by that view. Cf. Randy Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269, 287 (1986) (“Process-based theories shift the focus of the inquiry from the contract parties and from the substance of the parties’ agreement to the manner in which the parties reached their agreement. Such theories posit appropriate procedures for establishing enforceable obligations and then assess any given transaction to see if these procedures were followed. The best known theory of this sort is the bargain theory of consideration.”).

<sup>47</sup> For purposes of this article, I treat the views considered here as alternatives to one another, and do not address how they might be integrated into a single view. Cf. Jody Kraus, *Reconciling Autonomy and Efficiency in Contract Law: the Vertical Integration Strategy*, 11 Phil. Issues 16 (2001).

the other child to choose a slice is a procedure that is perfectly designed (claims Rawls) to achieve equal division of the cake. In that case, there is an exogenous standard by which to assess the outcome (equality of cake slices), but also total confidence that the procedure will achieve that outcome. Finally, there is imperfect procedural justice. A jury trial is an imperfect procedure by which to adjudicate the guilt of a criminal defendant because, assuming that there is a truth of the matter as to his guilt, the procedure is imperfect in that it will not always deliver the just verdict.

Contractual processes deliver outcomes that can be described as just or unjust. The tendency to avoid the language of justice with respect to contractual outcomes might reflect the dominant view that contractual outcomes are rarely unjust, or actually self-justifying. This in turn reflects the influence of pure theories of contract, in which the process of contract formation, and the consent of the parties in particular, ensures the justice of whatever content is agreed upon, as well as the material outcomes for the parties that follow from those terms.

In *pure* contract, a basic principle such as autonomy or the value of promise justifies enforcement of contract and shapes the rules of enforcement. Where the underlying principle is at work, outcomes are irrelevant; contracts should be enforced without regard to the substance of terms or the material consequences to parties that flow from those terms. Case law sometimes uses the rhetoric associated with pure contract.<sup>48</sup> The rhetoric of “freedom of contract” stems from a view of contract as pure. From this perspective, facts about a particular type of transaction are relevant only inasmuch as they call into question whether the fundamental value serviced by contract is in fact being advanced. Competing values are not of interest except at the extreme (e.g. illegality).

---

<sup>48</sup> See, e.g., *Printing and Numerical Registering Co. v. Sampson L. R.*, 19 Eq. 462, 465 (1875) (“if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the Courts of justice”).

Scholars who view the contractual process as *perfect*, such as many legal economists, believe that the process of contract formation, including but not limited to the consent of the parties, gives rise to confidence that most contracts are value-generating and leave both parties better off than prior to contract.<sup>49</sup> They may hold this view either because the assent of both parties is a reliable indication that it improves the position of both<sup>50</sup> or because competitive markets dictate efficient terms irrespective of the state of mind of individual parties.<sup>51</sup> Other scholars may agree that cognitive limitations, including informational problems, render assent an unreliable indicator of optimality, and may further acknowledge that markets often fail to generate consistently optimal terms, but nevertheless maintain that for purposes of contract law courts must proceed *as if* terms were perfectly suited to maximizing welfare due to epistemic and institutional constraints.<sup>52</sup>

Finally, in a view of contract as *imperfect* (such as the view advanced here), contract is an imperfect means by which parties attempt to regulate certain exchanges and

---

<sup>49</sup> One might doubt that legal economists usually make a normative claim about how contract rules should be assessed, i.e., in Jody Kraus' terms, that they offer efficiency and wealth-maximization as "external justifications" for existing law. See Jody Kraus, *Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency*, 1 J. S. Pol. & Legal Phil. 385, 401 (2002) (contrasting external justification with internally justificatory accounts, as well as predictive or explanatory accounts). But at least some important legal economists expressly make this claim, and most implicitly endorse it inasmuch as they judge various doctrinal possibilities based on their efficiency implications. See Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487 (1980); Richard Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. Leg. Stud. 191 (1980).

<sup>50</sup> See Steven Shavell, *Foundations of Economic Analysis of Law* 293 (2004); Richard Posner, *Economic Analysis of Law* 11 (1998) ("resources tend to gravitate toward their most valuable uses if voluntary exchange – a market – is permitted."); Lewis Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. Colo. L. Rev. 683 (1985-86) ("The assumptions of rationality and utility maximization provide a theory of contract formation: every clause must be 'rational' for each party. In negotiating over a particular contingency, each party will evaluate the worth (or cost) to her of contract performance under that contingency. The promisor will demand sufficient payment to cover her expected costs.").

<sup>51</sup> See Lucian Bebchuk & Richard Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 Mich. L. Rev. 827, 827 (2005) ("The usual assumption in economic analysis of law is that in a competitive market without information asymmetries, the terms of contracts between sellers and buyers will be optimal—that is, that any deviation from these terms would impose expected costs on one party that exceed benefits to the other."). Cf. Friedrich Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract*, 43 Colum. L. Rev. 629, 640 (1943) ("Freedom of contract...receives its moral justification" from "freedom of property...of profit making and trade." The "'prestabilized harmony' of a social system based on freedom of enterprise and perfect competition sees to it that the 'private autonomy' of contracting parties will be kept within bounds and will work out to the benefit of the whole.").

<sup>52</sup> See, e.g., Alan Schwartz & Louis Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev. 630 (1978); Eric Posner, *A Theory of Contract Law under Conditions of Radical Judicial Error*, 94 Nw. U. L. Rev. 749, 754 (1999) ("courts are radically incompetent when it comes to meeting the demands that are placed on them by relational contracts").

relationships. Whether a given contract warrants deference on grounds of autonomy or whether it should be modified on welfarist or public policy grounds depends on context-specific considerations, because no general feature of contract justifies any uniform mode of contract enforcement.

One might view contracts as imperfect along a single value axis, such as efficiency, due to market failures and cognitive limitations. An imperfect view of contract need not be pluralist.<sup>53</sup> However, most scholars who doubt that contracts should be enforced as drafted or are skeptical about the deference traditionally accorded contractual intent are moved by some value other than the one that motivates enforcement of contract in the first place. That is, we do not doubt that one or more important values are advanced by the institution of contract, but their weight is variable across contracts and no single variable is dispositive on questions of interpretation or enforcement. Even if autonomy or the institution of promise is well-served by contract enforcement, those values do not preempt inquiry into whether certain types of contracts undermine other values. The competing values may be relevant either to the interpersonal relations between contractual parties or they may be public values, such as distributive justice, that are implicated by virtue of the patterned nature of most commercial contracting. Contract scholars such as Melvin Eisenberg, Dori Kimel and Tim Scanlon have offered imperfect theories of contract that accommodate this range of values.

Distinguishing contract terms that are worthy of uncomplicated deference from those which should be treated with caution or rejected altogether requires investigation into the circumstances of contract. In particular, it entails asking why parties contract with each other and why they choose the terms to which they admittedly (in some relevant sense) consent.

---

<sup>53</sup> I refer to pluralist theories as ones which accommodate a range of values. These theories may or may not apply separate bodies of law to different kinds of contracts. Cf. Ethan Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 Q. L. R. 1, 4 (2005-06) (theories directed at person-to-person contracts and organization-to-organization contracts, respectively, each have their place in a pluralistic theory of contract law).

If the process by which contracts are formed matters to the way we should enforce contracts, it follows that no single model of contract will suffice. There is too much heterogeneity among contracts. The classical picture of contract is not so much substantively flawed – after all, some contracts comport with precisely that model -- the problem is rather its implicit claim of singularity. Because the process of contract formation matters, no grand theory of contract will accurately capture the normative force of agreement and consistently deliver the most appropriate tools of interpretation.

In order to flesh out the differences between pure, perfect and imperfect theories of contract, how they differ in their doctrinal prescriptions, and to demonstrate the limitations of the two former categories, the remainder of this Part discusses how these labels apply to a number of important theories of contract.

#### A. Pure

Pure theories of contract usually start with a commitment to autonomy. This commitment is not unique, but it does special work in views of contract which see the institution as essentially serving autonomy. As Gregory Klass has pointed out, there are important differences between theorists who emphasize the ways in which autonomy or some other value result in the ascription of moral obligation upon certain acts or words, and those which emphasize that contract enhances or extends autonomy by making it possible for us to bind ourselves in ways that we otherwise could not.<sup>54</sup> The theories considered below fall on both sides of this useful line, but they have in common a view of contract that is more or less internally complete with reference to a single underlying value.

The three theories I will consider here are the promise-based account of Charles Fried, the consent-based account of Randy Barnett, and the sovereignty-based account of Jody Kraus. In Fried's account, the moral obligations of promise both justify and require legal

---

<sup>54</sup> Gregory Klass, *Three Pictures of Contract: Duty, Power and Compound Rule*, 83 N.Y.U. L. Rev. 1726-1783 (2008).

enforcement of certain promises. In Barnett's account, manifestation of assent to be legally bound require and justify legal enforcement of contractual obligations. In Kraus' account, the principle of personal sovereignty requires that individuals be treated as capable of assuming legally binding obligations where they attempt to do so. Each of these theories makes claims of both necessity and sufficiency, and presents itself as an alternative to the others. It does not easily accommodate values outside of the single value around which it is centered, which is itself conceived at a high level of abstraction. There is little room left in which to attend to details of the contractual process and how those social facts might affect appropriate judicial treatment of particular terms. The respective insights of each theory are obscured by its monotheistic character.

#### 1. Charles Fried

Charles Fried gave the most comprehensive account of contract as promise in his book by that title, published thirty years ago. In that book, he argued that individuals should value the institution of promise because it generates a range of benefits attainable only through the cultivation of trust; most notably, it makes it possible to alter one's one normative position.<sup>55</sup> Promises are not just useful, however. Once made, they are morally binding because breach of a promise represents abuse of the institution. To make a promise and then break it, he argues, is to exploit a convention in way that is disrespectful to all its participants.<sup>56</sup> He describes his view as Kantian because he sees the duty to keep promises as

---

<sup>55</sup> Charles Fried, *Contract as Promise* 13 (1982) ("In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself. It is necessary that I be able to make nonoptional a course of conduct that would otherwise be optional for me.")

<sup>56</sup> *Id.* at 16 ("An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds - moral grounds - for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now is like (but only like) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust. A liar and a promise-breaker each use another person. In both speech and promising there is an invitation to the other to trust, to make himself vulnerable; the liar and the promise-breaker then abuse that trust.").

a presumptively absolute one that reflects the promisor's own autonomy interests.<sup>57</sup> And like Kant, he finds that our autonomy interest requires treating others in a manner that is consistent with a rule or convention that we would ourselves endorse.<sup>58</sup> Fried famously argues that contractual obligation is just a "special case" of the more "general obligation to keep promises," and that "the contract must be kept because a promise must be kept."

Fried's theory hangs on the classical picture of contract. He does not spend much time describing the circumstances under which most contracting occurs, including the motivations of the parties for making the particular promises they make to one another, or the absolute and relative degrees of necessity each side may perceive in the transaction. But he presumes that parties encounter each other with no moral, political or social baggage. He observes, for example, that "[b]y promising we transform a choice that was morally neutral into a choice that is morally compelled."<sup>59</sup>

But the making of most promises is not morally neutral. Ordinary promises are especially likely to be situated within intimate relationships with thick pre-existing norms and obligations. But even contractual promises arise against background duties owed by citizens or residents of a political economy toward one another,<sup>60</sup> as well more particularized duties that often precede contract within relations or networks of exchange.<sup>61</sup> An employer may enter into a new contract of employment with an individual because the employer previously

---

<sup>57</sup> *Id.* at 14 ("The restrictions involved in promising are restrictions undertaken just in order to increase one's options in the long run, and thus are perfectly consistent with the principle of autonomy-consistent with a respect for one's own autonomy and the autonomy of others.").

<sup>58</sup> *Id.* at 17 ("To summarize: There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.").

<sup>59</sup> *Id.* at 8.

<sup>60</sup> For a more extended discussion of the ways in which the choice of contracting terms is a morally fraught choice, see Aditi Bagchi, *Managing Moral Risk: the Case of Contract*, 112 *Columbia L. Rev.* (2011).

<sup>61</sup> *Cf.* P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 *Law Q. Rev.* 193, 219 (1978) ("The purpose of a promise, far from being, as is so often assumed, to create some wholly independent source of an obligation, is frequently to bolster up an already existing duty. Promises help to clarify, to quantify, to give precision to moral obligations, many of which exist or would arise anyhow from the performance of acts which are contemplated or invited by the promise.").

promised a promotion. A person may agree to hire one person rather than another because she is duty-bound to offer someone like her an opportunity that others in her group have been historically denied, or she may hire the person on terms offered to other employees because there is a norm of equality with respect to those terms. A person may agree to contract on particular terms because other terms she might prefer would breach a background duty of fairness or justice that she has to her prospective partner. These examples may remind one of Patrick Atiyah's claim that promises may be regarded as evidence of a duty owed by the promisor to the promisee.<sup>62</sup> Or of David Slawson's claim that under "the new meaning of contract," contracts entail just those obligations which consumers would reasonably expect, though businesses are free to spell out and give definition to those obligations within the bounds of reasonableness.<sup>63</sup> In each of the above cases it is strictly speaking true that the particular content of the promise determines what the promisor is obligated to do; the background moral claims do not explain the full or precise content of the obligation assumed.<sup>64</sup> But the promise is not morally neutral in the way Fried assumes. The universe of moral considerations extends beyond the single value of autonomy in which Fried is interested.

Fried does not expressly presume equal bargaining power, but he does describe contracting in a way that implies that parties are similarly situated vis a vis one another, and need each other equally. For example, he explains the motivation of contracting parties thus: "You want to accomplish purpose A and I want to accomplish purpose B. Neither of us can

---

<sup>62</sup> *Id.* at 207 ("an explicit promise may...serve valuable evidentiary purposes"); see also *id.* at 209.

<sup>63</sup> W. David Slawson, *The New Meaning of Contract: The Transformation of Contract Law by Standard Forms*, 46 U. Pitt. L. Rev. 21, 28 (1984-85).

<sup>64</sup> In many cases, the background duty is best understood as an imperfect duty, in that it does not generate a detailed obligation to commit specific acts but renders an individual duty-bound to promote some ends across a number of acts. See Immanuel Kant, *The Metaphysics of Morals* 153 (Mary Gregor ed. & trans., 1996). For an example of a relevant imperfect duty, see Aditi Bagchi, *Distributive Injustice and Private Law*, 60 Hastings L. J. 105, 122-24 (2008) (arguing that background distributive injustice creates imperfect social rights that bear on the scope of justiciable rights in private law).

succeed without the cooperation of the other. Thus I want to be able to commit myself to help you achieve A so that you will commit yourself to help me achieve B.”<sup>65</sup>

Whether one envisions the contracting process as characterized by equal bargaining power affects whether one is likely to be concerned with the quality of consent behind promissory obligation. If everyone enters into contract as a result of a benign mutual interdependence, contract facilitates cooperation, not exploitation. Understood this way, whatever logical limits there are to consent are just the inevitable limits to human freedom where we are needy beings who want things that can only be had with the cooperation of others. This aspect of the human condition may or may not be a tragedy, but it is at least not an injustice.

But if we understand contract to arise between persons who are not equally dependent on one another, the story reads differently. The quality of consent is more concerning – and one is more likely to see it as failing in particular instances – if it is variable, and especially if it varies even between the two parties to a given contract. It is difficult to apprehend let alone settle on an abstract, absolute level of consent that validates the enforcement of agreements. But the question before courts is whether an agreement should be enforceable by one party as against another, and if there is a difference in the relative quality of consent that those two parties brought to bear on the initial agreement, that can be normatively significant in a way that Fried’s picture of contract does not allow. The differences between contracting parties are negligible if their only relevant traits are their most abstract powers of reason and choice.

Fried’s promise-centered view of contract produces an unconditional, absolutist view of contractual obligation that is one of its virtues, from at least the perspective of Fried himself. He regards it as essential to an attractive (or accurate) view of contract as an institution that it be predictably consistent in its admonition to keep promises. His view of

---

<sup>65</sup> Fried, *supra* note x, at 13.

contractual obligation generates a duty to keep each promise irrespective of most facts that arise after the time of contracting, except for those limited range of facts that undermine the value underpinning contract in the first place. That is, only facts that suggest that the making of the promise – and being held to it – would not be an expression of autonomy are entitled to be considered in the judgment of whether to enforce a contract; other facts that speak to the desirability of the outcome resulting from contract enforcement are not relevant.

Even circumscribed to considerations of autonomy, the inquiry he envisions is too narrow. Because even if enforcing promises that were intended to be legally binding effectuates the autonomy of promisors, it does not exhaust the mandates of autonomy. For example, although I do not espouse let alone adequately defend such a view here, our ongoing autonomy interests might encompass the power to reconstitute our ends, adjust our life plans and revise our obligations. Of course, to the extent the power to change ourselves in these morally salient ways implicates the rights of others, our autonomy interest is outweighed by the interests of others. But Fried wishes to defend the status of promissory obligations as binding with reference to the moral interests of the promisor alone. And in that case, it is unclear why we should privilege the autonomy interest in being able to create enforceable moral obligations over the autonomy interest in being able to continuously exercise our agency to the fullest, by revising our ends and rejecting earlier commitments we undertook.<sup>66</sup> This objection is not merely theoretical. It is not at all clear that the *autonomy* of consumers, franchisees, and employees who regret their choices in contract is well-served by holding them to the promises they made in situations from which they wish to extricate themselves, and with priorities or values they now disavow.

Moreover, a moral or legal rule that recognizes the power to bind oneself through promise *without qualification* is not obviously one that best respects the autonomy of persons.

---

<sup>66</sup> See Jacques Rousseau, *The Social Contract* (1782), cited in E. Allen Farnsworth, *Changing Your Mind: The Law of Regretted Decisions* 1 (1998).

When one envisions contracting along the lines featured in the classical picture of contracting, it might appear that by contrast the terms on which one chooses to obligate oneself have no impact on others, and thus should be presumptively free and binding once agreed upon. But in a market, and especially in those markets where terms are homogenous across contracting parties, the terms to which a single party agrees directly affect the probability of those or other terms being offered to others. More generally, the pattern of conduct that takes place within a single contractual relationship informs other parties who contract with the same partner or other similarly situated parties. Thus, regulators as well as courts may have reasons for restricting the terms on which parties are free to contract in order to preserve certain contracting freedoms for other parties. The terms available to those who follow are as important to their autonomy as are the terms on which a given promisor is permitted to contract.

A utilitarian take on contract may be vulnerable to a range of critiques, but for Fried, one of its chief flaws is the conditionality of contractual obligation on such a view. He complains of that view that “it will allow me to break my promise whenever the balance of advantage (including, of course, my own advantage) tips in that direction. The possible damage to the institution of promising is only one factor in the calculation...There is no a priori reason for believing that an individual's calculations will come out in favor of keeping the promise always, sometimes, or most of the time.”<sup>67</sup>

It is certainly not my aim here to defend the utilitarian perspective. But the argument here is that the sanctity of promise is only one of many moral imperatives that flow from the over-arching principle of autonomy, and a priori reasons derivative from the principle of autonomy are only a subset of the relevant considerations. A principle that makes no room for other considerations is not principled but arbitrary in its exclusion of the rich diversity of

---

<sup>67</sup> *Id.* at 15-16.

considerations that we bring to bear on most weighty moral and political matters, including the enforcement of contract.

## 2. Randy Barnett

One of the problems others have pointed out with respect to Charles Fried's promissory theory of contract is that it fails to explain why some promises are enforceable while others are not. Randy Barnett's consent-based theory of contract corrects for this flaw by hinging contractual enforcement on the parties' consent to legal enforcement of their contractual obligations.<sup>68</sup> While promise theory turns on the invocation of the social institution of contract, consent theory turns on the invocation of the legal institution of contract.<sup>69</sup> In this view, "legal enforcement is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights."<sup>70</sup> The theory of contract piggy backs on an underlying theory about entitlements and how they are acquired and transferred.<sup>71</sup>

Importantly, the operative consent on this view is not consent to assume a moral obligation but rather consent to state enforcement of the obligation assumed. Moreover, consent is not merely a subjective mental state. Although correspondence between subjective and object intent is normatively desirable, Barnett explains that "[t]he consent that is required" for enforceability "is a manifestation of an intention to alienate rights."<sup>72</sup> Courts are justified in imposing legal liability based on a contract where the party indicated in advance that she is prepared to accept that specific authority, presumably in exchange for the moral and material benefits of making a credible commitment to the other party.

---

<sup>68</sup> Randy Barnett, *A Consent Theory of Contract*, 86 *Columbia L. Rev.* 269, 304 (1986).

<sup>69</sup> *Id.* at 304-05.

<sup>70</sup> *Id.* at 300.

<sup>71</sup> *Id.* at 292.

<sup>72</sup> *Id.* at 304.

This view is best understood as a “pure” view of contract because consent is a necessary<sup>73</sup> and sufficient<sup>74</sup> condition for the imposition of legal liability (upon breach of contract). Its logic and clarity are highly appealing. Barnett is persuasive about the justificatory force of consent at a foundational level. But Barnett asks consent to do too much. Even if consent to contract underpins the imposition of liability in connection with an agreement, it cannot account for each of the specific obligations to which a given contract gives rise; it cannot be understood to be a necessary condition for the legitimacy of each of those terms.

Just as consent falters when it is regarded as a necessary condition for specific contractual obligation, rather than the existence of a contract, the absence of consent is not the only justification for refusing to enforce terms of an agreement to which the parties indicated assent. Barnett allows for only narrow exceptions to enforcement where intention to be legally bound was in fact manifest. This requires enforcement even where that result would produce unattractive results (unattractive on fairness, welfare or efficiency criteria) as between the two parties to the contract in question or which contribute to a pattern of contracting that is socially undesirable for reasons that have nothing to do with the intentions or interests of the parties to a given contract.

a. Consent as a Necessary Condition

Requiring manifestation of an intention to be legally bound may be intuitively plausible if contracting is a fully deliberate activity. In the classic picture of contracting, terms are indeed deliberately selected from a range of possibilities, and parties are both informed and careful about the obligations they assume and the role of the state in enforcing

---

<sup>73</sup> *Id.* at 318 (“Consent, either formal or informal, is required to make out a prima facie case of contractual obligation.”).

<sup>74</sup> *Id.* at 318 (“in the absence of an ‘affirmative’ defense to the prima facie case of contractual obligation, the manifested intention of a party to transfer alienable rights will justify the enforcement of such a commitment”).

those obligations. But in situations such as parallel contract, there is no magic moment of contract.

At the moment at which a contractual relationship begins, the parties express an intention to be legally bound. But they do not specify even all those terms which their express agreement appears to contemplate, and therefore, it is unclear whether they intend terms that acquire specificity at a later date to be fully enforceable, or enforceable only at the minimum threshold that would be consistent with the initial agreement. For example, if an employer and an employee agree on health care coverage but do not specify which health care plan will be provided and at what premium, is the health care plan ultimately provided subsumed under the original agreement such that it becomes a contractual entitlement itself? Or should it be understood not as a specification of a contractual obligation but as the exercise of discretion under the contract, such that down the road provision of any health care plan should be understood to fulfill the employer's obligation to provide coverage, if it would have been acceptable at the outset? In principle, we can simply ask what the parties intended at the time of initial contracting. But the reality is that the parties may not have thought about the scope of legal enforcement, and if they did, their expectations as to the contract's legal operation were likely to differ substantially.

More generally, fidelity to Barnett's consent requirement (without consent, the parties' "freedom from contract" is violated), means twisting the notion of consent to the inevitability of incomplete contracts. All contracts are incomplete, and courts rely on default rules to fill in contractual gaps.<sup>75</sup> Richard Craswell has argued that consent simply fails to generate specific default rules in light of the ambiguous and general quality of parties'

---

<sup>75</sup> Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989)

consent.<sup>76</sup> Barnett argues in reply that consent provides a reason to prefer some interpretative defaults over others. In some cases, the silence of the parties is appropriately interpreted as consent to application of established defaults.<sup>77</sup> In other cases, majoritarian defaults conform to prevailing understandings of the applicable legal rule, even if those rules and the possibility of their application were never specifically contemplated.<sup>78</sup>

Even if we are able to discern that the parties' intentions are better served by interpreting and enforcing the contract one way or the other, the more elaborate and hypothetical the exercise of connecting their intentions with specific obligations the less normatively compelling the "fact" of their consent to whatever content we settle upon. Consent is most compelling when it corresponds to an actual cognitive moment, not when it is constructed or extrapolated.<sup>79</sup> Because once we embark upon an exercise of constructing consent, we are always asking a normative question about when it would be reasonable to deem a party as having consented. Reasonableness, especially as assessed by judges, is not an empirical examination of whether more people are likely to interpret events one way rather than another. When a court inquires whether a party should be deemed to have assumed a particular obligation they are asking (or at least take into account) whether the world would be better off (whether in a utilitarian sense or otherwise) if such an obligation were

---

<sup>76</sup> Richard Craswell, *Contract Law, Default Rules and the Philosophy of Promising*, 88 Mich. L. Rev. 489 (1989).

<sup>77</sup> Randy Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 827 (1992); see also Randy Barnett, *And Contractual Consent...*, 3 S. Cal. Interdisc. L.J. 421, 430 (1994) ("Although these tacit assumptions are not conscious, they are nonetheless quite real and they account for much, though not all, of the parties' silence.").

<sup>78</sup> Barnett, *Sound of Silence*, supra note x, at 827.

<sup>79</sup> Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. Cal. Interdisc. L.J. 115, 154-55 (1993) ("To support the contract's legitimate authority, consent must be voluntary, knowing, and deliberate. Even tacit assumptions thus may not rest on consent."); Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. Cal. Interdisc. L.J. 43, 54 (1993) ("looking at default rules as a validation of consent is incoherent unless one waters down consent to such an extent that it is unrecognizable").

imposed.<sup>80</sup> That inquiry diverges from the classic account of consent which centers squarely on the internal intentions of the party in question, including their background (subconscious) assumptions.<sup>81</sup>

When discussing the details of interpretation, Barnett himself seems open to the consideration of factors other than consent. He does not describe interpretation as an exercise in maximizing the probability that the terms as enforced correspond to how the parties would have expected the agreement to be enforced. He does not assert that terms supplied by default rules are never imposed for reasons of principle or policy, just that they are not “invariably” of this type.<sup>82</sup> Given the lack of evidence judges likely face regarding the parties’ state of mind in contracting, he accepts that both moral theory and economic analysis appropriately figure in the selection of default rules.<sup>83</sup> Although the role of these theories is supposed to be a reconstruction of consent, he admits such a resort to theory is “funny evidence” of consent. He also allows outright for the independent significance of exogenous policies, though he insists that “there is always an additional reason that partly explains and justifies the enforcement of whatever background rules are chosen: the parties have

---

<sup>80</sup> See, e.g., *Gravenhorst v. Zimmerman*, 236 N.Y. 22 (1923) (rejecting alleged trade usage that would lead to unreasonable result); *Fuller v Robinson*, 86 N.Y., 306 (1881) (rejecting alleged trade usage as unreasonable and absurd); *Patterson v. Bixby*, 58 Wash. 2d 454, 458 (1961) (contract will be interpreted to attain a result that is fair to both parties). See also 3 Corbin Sec. 550 (interpretation or construction that favors public interest will be preferred); Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1252 (1982) (application of many common legal standards “will turn in part on an appreciation of current ordinary practice that is not based on courtroom evidence, and in part – and especially in changing circumstances -- on a sense of what would be a reasonable practice.”).

<sup>81</sup> Even Barnett himself seems to envision an open-ended inquiry. See Randy Barnett, *Consenting to Form Contracts*, 71 Fordham L. Rev. 627, 638 (2002) (“By clicking ‘I agree’ I am expressing my intent to be bound by the terms I am likely to have read (whether or not I have done so) and also by those unread terms in the agreement above that I am not likely to have read but that do not exceed some bound of reasonableness.”).

<sup>82</sup> Barnett, *Sound of Silence*, supra note x, at 826.

<sup>83</sup> *Id.* at 908-09. See also Barnett, *Form Contracts*, supra note x, at 638 (“Discerning whether or not an ‘invisible’ term is radically unexpected would require an inquiry much like what law and economic analysis provides.”).

manifested their intent to be legally bound.”<sup>84</sup> And he admits that the “legitimizing character of consent” might “run out at some point,” but argues that “it can be revived” by the choice of legal system itself.<sup>85</sup>

It is not clear why Barnett insists on the priority of consent at all stages of contract interpretation. A weaker version of the theory could hold that consent to enter contract is necessary before contract law can be invoked in the first place, and that the legitimacy of imposing liability on a party is enhanced by (but does not require) reasons for believing that she would have consented to the particular obligations she is deemed to have breached. The reasons he articulates for requiring consent – namely, facilitating a system that takes into account private information and enables reliance on the existing distribution of resources<sup>86</sup> – are not inherently exclusionary. These are reasons for *favoring* a system that does not lightly transfer private entitlements, not reasons for rejecting all possible constellations of contract doctrine but one.

#### b. Consent as Sufficient Condition for Binding Obligation

Taking consent to be an adequate condition for enforceable obligation produces unfamiliar and unattractive results too.<sup>87</sup> Barnett allows for a limited set of circumstances under which contractual obligation can be excused; excuses are limited to cases where manifestation of assent lacks its “normal moral...significance.”<sup>88</sup> These cases fall into three groups. In the first category, consent was obtained improperly, as by way of duress or misrepresentation. In the second category, the promisor lacked the ability to meaningfully consent, as in incapacity. The third and final category covers situations in which consent was

---

<sup>84</sup> Barnett, *Sound of Silence*, supra note x, at 862-63.

<sup>85</sup> Barnett, *Consent Theory*, supra note x, at 431.

<sup>86</sup> Barnett, *Sound of Silence*, supra note x, at 859-60.

<sup>87</sup> *Cf. id.* at 828 (“Freedom of contract entails both freedom to contract—the power to effect one’s legal relations by consent—and freedom from contract—the immunity from having one’s rights to resources transferred without one’s consent.”).

<sup>88</sup> Barnett, *Consent Theory*, supra note x, at 318.

offered based on an assumption that later proves false, and where the promisor whose consent was so compromised ought not to bear the risk of the error in her assumptions.<sup>89</sup>

However, some of the situations in which we override a party's consent are ones where consent does not have its ordinary moral significance because it was a function of unfortunate facts, even if those facts are not the fault of the other party. For example, a party that lacks information or favorable options may be spared the results of her own free contracting on the grounds that her consent reflects a cramping of personality and autonomy, rather than its flourishing.

Consider regulations that make it possible to void certain kinds of purchases without inquiry (e.g., from door-to-door salespeople or at the beauty counters in department stores). Regulatory intervention that makes it impossible to bind oneself in certain ways, on these grounds, does not necessarily comment on the conduct of the other party in the usual or in any particular case. It simply recognizes that the value in allowing people to freely transfer their entitlements – significant as it is – sits alongside other values which are not always equally well-served by enforcement of particular kinds of promises. For example, an employee may have an interest in choosing the free transfer her entitlement to her time in exchange for wages, but an agency may choose to limit the terms on which she can do so on the grounds that tying her hands may make it possible for her to extract better terms from an employer.

More often, legal restrictions on contract outside the categories identified by Barnett is motivated by the interests of individuals outside any particular prospective contract. It is aimed at altering a pattern of contracting. In the example above, we restrict the terms on which employees may contract with employers even where they would prefer the unavailable

---

<sup>89</sup> Id. at 318.

terms for the benefit of *other* employees, who are less likely to obtain their preferred terms should they have to compete with employees willing to work on terms more preferable to employers. Whether this calculation ultimately makes sense depends on empirical questions, as well as a value judgment about the relative weight of the interests of various categories of employees. But the answer cannot be decided with reference to the sanctity of the underlying entitlements. An entitlement theory identifies important values in treating certain prerogatives as presumptive, and certain transfers of those entitlements as presumptively enforceable. But it does not plausibly identify the only value implicated by a contracting regime, and it does not trump the other values that sometimes surface.

To be fair, Barnett's theory is targeted toward explaining and guiding adjudication in common law, not warding off statutory regulation. But the consent-based view historically and theoretically tends toward radical prioritization of the interest in controlling our presumptive entitlements at the expense of other values, with the result that it breeds deep skepticism about any intervention in the contract relationship – *ex ante* or *ex post*.

### 3. Kraus

Most recently, Jody Kraus has offered another account of contract based on an underlying theory of promise. He begins with the fundamental value of personal sovereignty, which is intended to reflect “a conception of the individual as sovereign over all matters exclusively affecting his own life.”<sup>90</sup> Personal sovereignty on his view entails not just the right to choose not just one's values, ends or conception of the good life but also “how to pursue those ends.”<sup>91</sup> And he describes promising as “a particularly valuable means for pursuing ends.”<sup>92</sup> Kraus does not claim that all questions of moral permission and obligation

---

<sup>90</sup> Jody Kraus, *Personal Sovereignty and Normative Power Skepticism*, 109 Colum. L. Rev. Sidebar 126, 131 (2009).

<sup>91</sup> Jody Kraus, *The Correspondence of Contract and Promise*, 109 Colum. L. Rev. 1603, 1608-09 (2009).

<sup>92</sup> *Id.*

be answered with reference to personal sovereignty alone, but claims that recognizing the moral power to assume promissory obligation enhances personal sovereignty without undermining any competing moral value. It follows, he claims, that for those committed to personal sovereignty as a fundamental value, the normative power to bind oneself through promise is a basic individual liberty.<sup>93</sup>

Kraus presents contractual obligation as continuous with promissory obligation, and in this respect resembles Fried. Like Fried and Barnett, Kraus' view of contract is pure in that he sees the intention to assume an obligation as necessary and sufficient to justify recognition of such an obligation. Contractual obligations are promissory obligations, which are in turn moral obligations, and "[i]n the domain of moral obligation...intention serves not only to limit the range of actions over which individuals can be held morally accountable, but also as the sole source of purely self-originating moral responsibility."<sup>94</sup> Kraus emphasizes that on his view the normative power to make binding promises derives from the value of personal sovereignty, it does not merely serve it.<sup>95</sup> He argues that a theory of promise must hold that keeping a promise necessarily promotes a moral value (personal sovereignty, in the case of his theory) and that such a value is necessarily undermined by breaking a promise, or else "render promissory obligation contingent, dependent entirely on whether keeping a promise in an given instance promotes that interest or value."<sup>96</sup> The theory is thus motivated in part to capture the ostensibly absolute character of promissory obligation, which may be outweighed in a given instance by competing obligations or duties, but which is effective irrespective of the details of process or context. The personal sovereignty view is subject to three problems, each of which stems from this purity.

---

<sup>93</sup> *Id.* at 1609.

<sup>94</sup> *Id.* at 1615.

<sup>95</sup> Kraus, *Personal Sovereignty*, *supra* note x, at 133 ("The personal sovereignty account...explains promissory morality not on the consequentialism ground that it promotes some other moral value, but on the purely deontic ground that it derives from a fundamental moral value.").

<sup>96</sup> *Id.* at 130.

First, because Kraus draws a sharp boundary between obligation and duty, contractual obligation is deemed wholly voluntary and enforceable if and only if traceable to an intent to be bound.<sup>97</sup> However, though obligations that arise from contract may be distinctively voluntary as compared to other sources of legal liability, they are in fact mixed in that they reflect both background duties and voluntary undertakings. In other cases, background duties may mediate the relationship between contractual intent and the nature and scope of contractual obligation. Kraus' view of contractual obligation as wholly voluntary depends on the sharp line he draws between moral duties and moral obligations. Unlike the former, the latter are entirely self-imposed, and because promises are a mechanism by which to undertake a moral responsibility, promises create obligations rather than duties.<sup>98</sup>

The analytic sharpness of the distinction between duty and obligation does not map on to the reality of contractual obligation. As discussed above in connection with Fried, many contracts are undertaken in order to fulfill perceived duties.<sup>99</sup> Extralegal promises sometimes have this character, where a promisor makes a promise in order to assure a promisee that she will comply with some relevant norm or duty.

Overlap between voluntary obligation and involuntary duty is the usual case in contract. The legal rules by which promises are recognized as legally binding do not turn just on expressions of intention to be bound but also on facts about the relations out of which promise arise – facts that speak to duty as much as voluntary obligation. Most important, the doctrine of consideration treats promises that have been made in exchange for some benefit enforceable unless legal enforceability is expressly disclaimed; promises made in the absence of exchange are unenforceable even where the parties attempt to render the binding before the

---

<sup>97</sup> Kraus, *Correspondence*, supra note x, at 1617 (enforcing an obligation that a promisor did not intend to be legally binding violates her will)

<sup>98</sup> *Id.* at 1614-1.

<sup>99</sup> See supra notes 19-22 and accompanying text.

law.<sup>100</sup> The effect is that contracts are relations in which something would be owed, promise or no promise.<sup>101</sup> To be sure, the promise that one actually made in order to induce the benefit conferred by the promisee in return determines precisely what one owes. And while in some cases, in the absence of a promise, quasi-contract would avoid the result of unjust enrichment<sup>102</sup>, in other cases, no compensation at all would be legally required in the absence of a voluntary commitment.<sup>103</sup> But even where the law would not recognize any duty to pay for a benefit received, outside of personal relationships, something usually is owed from a moral standpoint upon receipt of a benefit. (It is not necessary here to claim that it is always owed.) This is why we avoid receiving benefits where we wish neither to assume any reciprocal obligation nor to imply the existence of the kind of relationship in which mutuality is not required.

One might argue that the duties created by receipt of a benefit are not properly regarded as involuntary duties because they are received in the context of a voluntary exchange. But if the act of exchange renders related obligations wholly voluntary, then many duties outside of contract, including in the realm of tort, are similarly voluntary. Many duties of care in tort arise upon the voluntary assumption of a role – sometimes in the context of exchange. They are involuntary in that the duties attach upon assumption of the role irrespective of whether they are ever expressly contemplated or embraced.

Contract is distinctly but not exhaustively voluntary. The role of contracting parties in setting their respective obligations is unique in that they participate more directly than in other spheres of potential legal liability. But their role is not unique in the sense of exclusive.

---

<sup>100</sup> See *In re Greene*.

<sup>101</sup> See Atiyah, *supra* note x, at 209 (“Promises are not a necessary condition of the existence of a liability or the creation of an obligation. The performance by one party of acts which are beneficial to the other, the rendering of services to another...would normally be thought of as creating some sort of obligation even in the absence of a promise. Similarly, acts of reasonable reliance would often create liability in tort, or by way of trust, or other equitable obligation, even where there is no express or implied promise.”).

<sup>102</sup>

<sup>103</sup>

Rules recognizing contract on grounds other than bare intention to be legally bound reflect some subset of the reasons we have for enforcing contractual obligation. The voluntary assumption of particular contractual obligations is another part of the totality of reasons for agreeing to enforce some promises but not others. Contractual obligation may be treated as a case of voluntary obligation rather than duty, but involuntary duty does background work in generating and shaping the promissory obligation.

In other cases, involuntary legal duties mediate between the obligations that an individual intends to undertake, and the actual scope of her contractual obligation. Like Barnett, Kraus sees the objectivity of contract as flowing naturally from his theory<sup>104</sup>, so the mere fact that we do not defer to the promisor's actual intent in each case but resort to defaults is not a challenge to the theory. However, these defaults cannot be reduced to our best guess as to – or a reasonable interpretation of -- promisors' intentions in the usual case. "Penalty defaults" are intended to force information out of a party that might be tempted to withhold certain information. Interpretive defaults sometimes also encapsulate involuntary duties in that they read the promisor's words and acts in such a way as to render the resulting obligation reasonable in their light. Consider interpretive defaults that require employment contracts to very expressly waive certain statutory rights, even if less clear language would be strong evidence that the parties intended to see those rights waived. As discussed in connection with Barnett's consent theory, this is a different exercise than the pure theory would suggest, which would focus at best on what the promisee might reasonably have understood the promisor to intend.

Involuntary duties thus inform the obligations we "freely" assume and also inform courts' interpretation of obligations that are not clearly specified. The result is that

---

<sup>104</sup> Kraus, *Correspondence*, *supra* note x, at 1624 ("Were personal sovereignty to refuse to treat objective promises as morally binding, it would infringe the positive liberty of individuals to choose the kinds of obligations they wish to undertake.").

regulators and courts have reasons for finding obligation outside of the parties' intentions. Those reasons may be insufficient without some kind of intent to contract; but the universe of reasons relevant for reading a specific contract term are not limited to the parties' intentions with respect to that particular contractual obligation.

The second problem with Kraus' view of contract is also one he shares with Fried.<sup>105</sup> Even if the normative power of making binding promises is appropriately regarded as a manifestation of personal sovereignty, there are other normative powers which we might also recognize on the grounds that they advance autonomy. As discussed above, the ability to continuously revise or at least occasionally update one's ends is also valuable to our sense of self-governance. If there are some rights that we treat as inalienable in order to honor and preserve dignity and autonomy, there are others that should be more difficult to alienate in order to preserve those same values. Tracing contract, via promise, to personal sovereignty is both plausible and compelling because of the wide span of the principle of autonomy. But that same breadth means the principle generates many imperatives, of which the promise principle is but one.

Finally, the boundaries of the power to obligate oneself implicates the sovereignty of others in ways similar to the boundaries of one's duties. Kraus claims to the contrary that, while individuals may not be delegated control over their moral duties because those affect others around him, we may be recognized to have the power to undertake obligations because it does not similarly diminish the sovereignty of others.<sup>106</sup>

Our duties to others obviously implicate others' interests, the latter usually motivating the content of those duties in the first place. But as discussed in connection with Fried, our voluntary obligations affect others too. Where each contract is viewed in isolation, and especially where the commitment undertaken by one party to a contract is viewed in isolation

---

<sup>105</sup> See supra note 24 and accompanying text.

<sup>106</sup> Kraus, *Personal Sovereignty*, supra note x, at 132.

from that of the other party's obligation (a perspective toward which the emphasis on promise tends), the obligations of one party may seem free-standing and without import for the obligations of either the other party or future parties. But in fact, when we make it impossible for a party to make certain legally binding commitments, or even just difficult to do so (e.g. by raising transaction costs through interpretive defaults), we alter the pressures to which the other party is subject, and therefore which promises she may make or avoid. In a market where individual exchanges are not negotiated, we affect the probability of certain contractual possibilities for later parties. When we interpret one party's obligations in one manner rather than another, we affect how similarly situated parties, as in parallel contract, are likely to understand the terms of their own agreements. The capacity to make binding commitments is a normative power with material impact on the world and other agents in it. Personal sovereignty cannot explain why we should maximize the sphere of contractual freedom for one at the expense of others.

None of this is to deny that personal sovereignty is implicated in how we regard promises, in morality and in law. But the truth in Kraus' account of promise, as in Barnett's and Fried's accounts, is undermined by the categorical nature of the claims they make on behalf of contractual intent. We can respect the importance of entitlements in the weight we assign them and the decision to transfer them. And we can respect the ways in which the normative power of promise-making serves the principle of autonomy by treating the fact that someone has voluntarily assumed a legally enforceable obligation as a weighty reason in favor of enforcement. But it need not follow that contractual intent is either a necessary or sufficient condition for imposing liability under an agreement that is generally voluntary. The particular weight we should assign the intent of the parties at the magic moment of contract appropriately turns on facts relating to the process by which their agreement came into being, and the process by which it was executed.

## A. Perfect

A perfect theory of contract differs from a pure theory in that it does not claim that the process of contract formation is self-justifying. The fact of assent does not justify enforcement of contracts directly but is rather an indicator of something else: that the exchange as contemplated by the parties is welfare-maximizing for those parties.<sup>107</sup> The basic idea is intuitive. If Ann is willing to exchange item A in order to obtain B she must value B more than A.<sup>108</sup> The difference in value between what she gives up (A) and what she secures through exchange (B) is her transactional surplus. In a voluntary exchange we would expect both parties to have such a surplus. Moreover, inasmuch as they choose to forego an infinite number of alternative terms on which they might have exchanged, we would expect the free exchange to maximize their joint transactional surplus. Consent, or at least, the voluntariness of exchange, does the work in this account of contract. But it is not normatively significant in itself. It is firm evidence that the exchange meets an exogenous test of efficiency, or welfare maximization.<sup>109</sup>

Another version of the perfect theory of contract focuses less on the assent of individuals and more on the market in which exchanges take place. For all the reasons that are commonly enlisted to explain the virtues of the market in efficiently allocating resources, we would expect voluntary exchanges that take place in competitive markets to occur on

---

<sup>107</sup> See Steven Shavell, *Foundations of Economic Analysis of Law* 293 (2004); Richard Posner, *Economic Analysis of Law* 11 (1998) (“resources tend to gravitate toward their most valuable uses if voluntary exchange – a market – is permitted.”).

<sup>108</sup> See Lewis Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 *U. Colo. L. Rev.* 683 (1985-86) (“The assumptions of rationality and utility maximization provide a theory of contract formation: every clause must be ‘rational’ for each party. In negotiating over a particular contingency, each party will evaluate the worth (or cost) to her of contract performance under that contingency. The promisor will demand sufficient payment to cover her expected costs.”).

<sup>109</sup> One might doubt that legal economists usually make a normative claim about how contract rules should be assessed, i.e., in Jody Kraus’ terms, that they offer efficiency and wealth-maximization as “external justifications” for existing law. See Jody Kraus, *Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency*, 1 *J. S. Pol. & Legal Phil.* 385, 401 (2002) (contrasting external justification with internally justificatory accounts, as well as predictive or explanatory accounts). But at least some important legal economists expressly make this claim, and most implicitly endorse it inasmuch as they judge various doctrinal possibilities based on their efficiency implications. See Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *Hofstra L. Rev.* 487 (1980); Richard Posner, *Utilitarianism, Economics and Legal Theory*, 8 *J. Leg. Stud.* 191 (1980).

terms that reflect optimal pricing and supply.<sup>110</sup> This account does not rely on informed consent by individuals to particular terms for confidence that those terms are welfare-maximizing.<sup>111</sup> The terms of individual contracts are not importantly set by individuals at all but are the product of market processes. The latter process is, again, not inherently worthy of deference, but rather facilitates private ordering on efficient market terms. The exogenous and independently defensible aim of optimally deploying social resources justifies deferring to a process well-positioned to achieve that result.

The perfect view of contract, with its emphasis on efficiency or welfare-maximization, is generally characteristic of economic theories of contract. Many economists would resist this characterization, however. No economist would deny the possibility of market failure, and most would acknowledge that behavioral economics has substantially undermined our confidence that parties consent to only those transactions that maximize or even improve their well-being. But the category probably encompasses more scholarship than scholars themselves are likely to admit, because many scholars of contract approach contract with a strong presumption that, even if contracting does not *in fact* produce optimal terms – i.e., even if reading contracts literally with the curtailed aim of deciphering parties’ intent will not enforce the optimal bargain – it is the best that courts can hope to accomplish.<sup>112</sup>

At first blush, treating contracts as presumptively optimal due to epistemic constraints may sound more like an imperfect view of contract than a perfect one. After all, almost no

---

<sup>110</sup> But see Florencia Marotta-Wurgler, Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements, 5 J. Empirical L. Stud. 447, 450 (2008) (finding little correlation between pro-buyer or pro-seller bias and any measure of competitive conditions); R. Ted Cruz & Jeffrey Hinck, Not My Brother’s Keeper: the inability of an Informed Minority to Correct for Imperfect Information, 47 Hastings L. J. 635 (1995); Lee Goldman, My Way and the Highway: the Law and Economics of Choice of Forum Clauses in Consumer Form Contracts, 86 Nw. U. L. Rev. 700 (1991-92).

<sup>111</sup> The move away from assent was motivated by theory and evidence undermining confidence that assent is in fact a reliance indicator of welfare improvement. See, e.g., Russell Korobkin, Bounded Rationality, Standard Form Contracts and Unconscionability, 70 U. Chi. L. Rev. 1203 (2003).

<sup>112</sup> See, e.g., Eric Posner, A Theory of Contract Law under Conditions of Radical Judicial Error, 94 Nw. U. L. Rev. 749, 754 (1999) (“courts are radically incompetent when it comes to meeting the demands that are placed on them by relational contracts”).

one proposes that contracts should not be presumptively enforceable. Even those most skeptical about the fairness and bindingness of contracts would enforce them as written in most cases. How is a view that deems them presumptively enforceable in light of the institutional limitations of courts fundamentally different?

The difference is that when we describe a view of contract as pure, perfect or imperfect, we do so with the aim of informing the interpretation and enforcement of contracts. Thus, the relevant question is not so much whether contracts are in fact self-justifying or will always comport with some exogenous standard but rather *whether courts should treat them as such*. Economists who argue that courts are systematically unable to gauge the facts that would be relevant to fine-tuning enforcement of contracts effectively argue that, for purposes of contract law, contracting should be regarded as perfect.

Some of the problems with a more straightforward perfect account of contracting have been well-developed by legal economists themselves, especially behavioral economists. Some have responded by invoking institutional constraints, and thus defend the more subtle variant of the perfect view. But other problems with the perfect view are less easily accommodated by resort to skepticism about the capabilities of judges and courts. For example, one of the most important challenges to the perfect view of contract doubts the radical priority afforded the principle of welfare maximization as the standard against which to assess either contracts or proposed enforcement regimes.<sup>113</sup>

Others would argue that scholars who argue for limited discretion in the application of rules of interpretation and enforcement underestimate the capacities of judges and juries and overestimate the costs associated with judicial error. The costs of judicial error might be less in aggregate than would appear to be the case because most cases are not ultimately resolved

---

<sup>113</sup> See Kraus, *Legal Theory and Contract Law*, supra note x, at 421-22 (doubting plausibility of economic theories of contract as external justifications); Ronald Dworkin, *Why Efficiency*, 8 *Hostra L. Rev.* 563 (1980); Anthony Kronman, *Wealth Maximization as a Normative Principle*, 9 *J. Leg. Stud.* 227 (1988); Jules Coleman, *Efficiency, Utility and Wealth Maximization*, 8 *Hostra L. Rev.* 509 (1980).

in court – and indeed, to the extent judicial error is frequent and unpredictable, we would expect private settlement to increase and opportunity for judicial error to proportionately decline. Finally, what legal economists regard as judicial error usually involves false reconstruction of contractual intent. But error from this standpoint may systematically favor the equities; that is, judges may not resolve factual uncertainty randomly but lean toward results which minimize loss, distribute loss more evenly, or penalize opportunistic behavior (even where technically permitted by contract). In that case, flexible standards are not an invitation to error but enable incorporation of norms that would be still more difficult through bright line rules – because the institutional process by which those rules would be written is flawed too.

#### B. Imperfect

An imperfect view of contract sees contract as less special than it might be regarded under the alternative perspectives. There is no single fundamental value from which general principles of contract must follow, and there is nothing about the process by which contracts are formed that can generate confidence that the terms which that process produce are necessarily just or worthy of deference by courts when asked to enforce them.

Most imperfect theories of contract are pluralist in that they treat as relevant a range of values in answering classic questions of contract doctrine.<sup>114</sup> While skepticism about the sanctity or reliability of contractual processes is possible with reference to a single value, those who see multiple values at stake in contract are especially likely to conclude that individual contracts do not consistently serve those values in ideal combination. There is no obvious mechanism by which one would expect the heterogeneous processes by which

---

<sup>114</sup> By contrast, pure theories of contract tend to only recognize one value. Although in principle they might recognize more than one value, those values must be co-correlative or conceptually linked such that all those cases in which enforcement is justified in light of the contractual process' conformity with a single principle are also ones where the process warrants deference in light of the other principle. Pure theorists tend naturally to be monist, and pluralist approaches tend naturally to be imperfect. However, the relationship between value-heterogeneity and the degree of deference to contractual process is contingent, not logical.

contracts are formed to perfectly negotiate relevant values, no reason to believe that contractual outcomes will reflect an optimal balance among those values.

Although imperfect theories of contract will usually acknowledge a range of relevant values, related prescriptions for contract doctrine need not be ad hoc. The process of adjudicating contract disputes may begin with certain presumptions – indeed, no scholar of contract, to my knowledge, has recommended either abandoning the presumption that contracts are enforceable or ignoring the intent of the parties in the course of interpreting its terms. And separate, irreducible values may each have a particular role to play at fixed points in a given adjudication.

A number of scholars have offered sophisticated accounts of contract which demonstrate the possibilities in an imperfect view of contract. Their accounts of contract are notably heterogeneous. But they have a common skepticism about the ability of a single value to justify contract enforcement and invite scrutiny of contractual outcomes in light of the range of relevant values.

Tim Scanlon has defended a view in which “the use of state power to enforce contracts, or to require compensation when they are breached, is morally permissible if a principle licensing this use is one that no one, suitably motivated, could reasonably reject.”<sup>115</sup> Notable at the outset is that he aims to explain why contract enforcement is justified, i.e., why the state may be authorized to use its powers in this manner; he does not aim to show that it is morally compulsory. He begins with the “value of choice,” i.e., “the value for an agent of having what happens (including what obligations are incurred) depend on how he or she responds when presented with a set of alternatives under certain conditions.”<sup>116</sup> Enforcing promises which are intended to be legally enforceable obligations<sup>117</sup> is a way of advancing

---

<sup>115</sup> T.M. Scanlon, Promises and Contracts, in *The Theory of Contract: New Essays* 100 (P. Benson ed., 2001).

<sup>116</sup> See Scanlon, *supra* note x, at 112.

<sup>117</sup> *Id.* at 104

the value of choice. Although he agrees with the common wisdom that promises are binding and enforceable only if they are voluntary, “choice is voluntary in the relevant sense just in case the circumstances under which it was made are ones such that no one could reasonably reject a principle that took choices made under those conditions to create binding (or enforceable) obligations.”<sup>118</sup> Voluntariness is more of a constraint on what is enforceable than an affirmative let alone dispositive reason why obligations should be enforced. If what is at issue is the value of choice, it is easy to see as Scanlon himself allows, that the value of choosing will vary on circumstantial factors. It is a principle that permits state enforcement in order to promote a value (the value of choice), not a principle that mandates state enforcement to comply with a principle. Scanlon distinguishes his view from one in which voluntariness confers moral legitimacy on outcomes.<sup>119</sup>

Scanlon not only allows that circumstances of choice are relevant to whether enforcement of a voluntarily assumed obligation well-serves the value of choice, but declines to specify *ex ante* what problematic circumstances might be. He maintains that “there is no simple way to spell out which limits of an agent’s options are objectionable” or “what constitutes ‘adequate’ access to information about one’s situation.”<sup>120</sup> Instead, “the ‘voluntariness’ of an action under given conditions depends on whether it would be reasonable to reject a principle that attached certain moral consequences to a choice under those circumstances, and this depends in turn on the claims of others as well as those of the agent in question.”<sup>121</sup> Scanlon does not see the question of voluntariness as “in general a question of distributive justice,” but specifically avoids “absolutist conclusions.”<sup>122</sup> Indeed,

---

<sup>118</sup> *Id.* at 114

<sup>119</sup> *Id.* at 115.

<sup>120</sup> *Id.* at 116.

<sup>121</sup> *Id.* at 116 n. 38.

<sup>122</sup> *Id.* at 117.

he specifically eschews the “special moral status” often assigned to choice, showing how it can have moral significance without dominating other values.<sup>123</sup>

One of the distinctive aspects of Scanlon’s view is precisely his ability to account for the significance of voluntariness and choice without proving too much. He does not push on choice and voluntariness until he arrives at a picture of contract that leaves no room for considerations that may not animate each aspect of contract doctrine, but nonetheless inform its proper application. Melvin Eisenberg offers a distinct but also pluralistic take on the values which underlie contract. He rejects the bargain theory of contract as too dogmatic in favor of a flexible approach that makes it easier both to admit the enforceability of promise but also to decline enforcement where appropriate. “The purposes behind enforcing promises... are too rich and varied to be captured by a single theory.”<sup>124</sup>

Eisenberg implies that the alternative to incorporating multiple values into contract adjudication is a lack of transparency. Where courts felt restricted in their reference to equitable norms, they “decided issues of fairness covertly, and expressed their decisions through the manipulation of rules and exceptions purportedly designed for other ends.”<sup>125</sup> Now courts may more openly refuse enforcement on grounds of unconscionability.<sup>126</sup> More generally, he argues, “[t]he principles governing the enforceability of promises should be based on the nature of the injury to the promisee, the presence of independent state policies, the likelihood of deliberativeness, and the ease of administration.”<sup>127</sup> Because Eisenberg declines to deduce the rules of contract interpretation and enforcement from a single value, and because he accommodates the significance of a range of facts that are implicated by the circumstances of contract, his account suggests an imperfect view of contract.

---

<sup>123</sup> Id. at 117.

<sup>124</sup> Id. at 665.

<sup>125</sup> Eisenberg, *supra* note x, at 640-41.

<sup>126</sup> Id.

<sup>127</sup> Id. at 664-65.

Dori Kimel offers still another example of a sophisticated view of contract that can be described as imperfect along the lines specified here. Like a number of pure theorists, he too would hold that “a central part of the justification for facilitating and enforcing contracts is the recognition of the value of voluntarily undertaken obligations.”<sup>128</sup> The institution of contract has this in common with the institution of promise, but they serve that value differently and different rules appropriately apply. The common voluntary character of obligation does not dictate a common structure to that obligation.<sup>129</sup> In particular, contract doctrine is importantly shaped by the harm principle, which derives from principles of political freedom rather than principles specific to either promise or contract.<sup>130</sup>

But Kimel does not suggest that the harm principle explains all important dimensions of contract any more than the value of voluntary obligations. Contract, on his view, is the “the legal equivalent of agreement” and “[a]greement is a moral institution, the limits of which – if you like, the limits on the freedom of which – are delineated by the entirety of moral considerations that have a bearing on the question of what agreement it is desirable or at least permissible, for people to make, as well as under what conditions.”<sup>131</sup> By facilitating contracting parties’ pursuit of various ends, “the law is implicated in the moral quality of the agreements it recognizes and enforces in a particularly direct and active way.”<sup>132</sup> Kimel is thus concerned less with whether the law may legitimately refuse to enforce certain contract terms and more with “how far the freedom of contract must extend in the first place; what kinds of transactions the law of contract ought to facilitate, and why.”<sup>133</sup> Those questions, he argues, must be answered on a case-by-case basis.<sup>134</sup> Contract law affects many forms of

---

<sup>128</sup> Dori Kimel, *The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model*, 27 *Oxford J. Legal Stud.* 233, 276 (2007).

<sup>129</sup> *Id.* at 277.

<sup>130</sup> *Id.* at 278.

<sup>131</sup> *Id.* at 287.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 287-88.

human flourishing, and ensuring that its effect is ultimately a positive one requires assessing the background circumstances of any given type of transaction as well as its effects.<sup>135</sup>

This small sampling of imperfect theories of contract demonstrates two points. First, imperfect theories do not necessarily see contract as a free form amalgamation of rules without rhyme or reason. Allowing for the relevance of multiple values does not preclude associating contract with one value in particular. Each imperfect theory of contract has its own account of why and how a range of values factors into contract interpretation and would assign facts about contractual process and context a specific role. Albeit in different ways, those facts determine for each theory whether the process by which a given set of contracts has been created renders those agreements worthy of deference, and how much. Second, imperfect theories are not alike. Some bear a family resemblance to pure theories of contract in their emphasis on the distinctive value of voluntary obligation; others find the analogy to private promise misleading. What they have in common is that they allow that courts may either impose liability for breach of obligations that a party did not specifically intend to assume, or decline to enforce contract terms under an open-ended range of circumstance.

#### IV. Conclusion

This Article has had two aims. First, I have offered a model of contract formation in which two central presumptions of the classical model do not hold true. In parallel contract, parties do not set or understand their obligations to one another solely by reference to their communications or dealing with each other. The party in a position to determine their respective obligations does so by way of acts and words directed at numerous individuals. As with contracts of adhesion, parallel contract is not robustly dyadic in the way present default rules presume.

---

<sup>135</sup> Id.

Second, as relational theory suggests is sometimes the case, parties to parallel contract do not take their respective obligations to be fully determined at the moment of contract formation. The terms agreed upon at the start of the contractual relationship comprise an initial agreement; but they do not amount to an “original agreement” which parties amend only through new and separate moments of contract.

Parallel contract demonstrates that details pertaining to contract formation are relevant to the appropriate norms of contract adjudication. The second aim of this Article has been to excavate the deep reasons why some theories of contract would resist such a conclusion. I have proposed a typology of contract theory that roughly tracks John Rawls’ distinctions between pure, perfect and imperfect theories of justice. In pure theories of contract, a single value related to promise or consent justifies enforcement of contract. Perfect theories are characterized by confidence regarding the ability of normal contractual processes to meet an exogenous normative standard, like efficiency or welfare-maximization. Theories of contract as imperfect tend to accommodate a range of values and are therefore less likely to see contract as invariably achieving an optimal balance among the values implicated; some of those values turn on outcomes and are underserved by the rigidities of contract law today.

Contract law today is already sprawling – it includes a common law that allows for some specialized rules for particular contractual circumstances, as well as many statutory regimes that apply rules specific to various contractual contexts.<sup>136</sup> As a pragmatic matter, the interpretive reforms called for here could be achieved through employment legislation (and legislation tailored to other situations where parallel contract may prevail) or reform on the margin, by way of small adjustments to the rules of interpretation in case law.

---

<sup>136</sup> See Jay Feinman, *Relational Contract theory in Context*, 94 *Northwestern L. Rev.* 737, 738 (2000) (describing “neo-classical contract law” as residual because statutes have carved out various types of transactions for special treatment, and fragmented because even the common law does not attempt to apply the same rules to all transactions).

There is no doubt that attempting to tailor rules to variations in the contractual process is costly; if it were not, we might be tempted to take into account all the details of process behind each individual contract, and no one is proposing that. Contract law cannot be completely tailored.<sup>137</sup> But nor can it be (or has it been) completely general.<sup>138</sup> When recognized law is too general, judges are prone to contorting contract law by overextending open-ended doctrines like unconscionability, duty of good faith, and promissory estoppel. The processes by which contracts are created are too diverse in fact and normative import to warrant a universal law of contract. Parallel contract is one repeat form of contracting that is distinct and frequent enough to warrant special treatment.

---

<sup>137</sup> See Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 *L. & Soc. Rev.* 507, 521 (1977) (“If writing about contract were to reflect the empirical operation of the contract system, we might lose the elegance and neatness that once gave us confidence that our doctrine supports and reflects our economic ideals. Instead of a neat system, we would risk being left with an unsatisfying collection of ideas where everything ‘depends.’”); Kessler, *supra* note x, at 636. (“To be sure, the task of building up a multiple system of contract law is eminently difficult, particularly since courts are not commissions which are able to examine carefully the ramifications of the problem involved, and can see only the narrow aspect of the total problem which comes up for litigation.”).

<sup>138</sup> Cf. Addison in *Treatise on Contracts* (1847) (“The law contracts may justly indeed be said to be a universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deduced from natural reason which are immutable and eternal.”).